DECISIONS

OF THE

NATIVE APPEAL AND DIVORCE COURT

(TRANSVAAL AND NATAL DIVISION).

1929.

VOLUME I.

With Alphabetical List of Cases and Subject Index and Introductory Address by the President of the Court.

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SUBJECT INDEX.

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ADDRESS BY THE PRESIDENT AT THE OPENING OF THE FIRST SESSION OF THE NATIVE APPEAL COURT— TRANSVAAL AND NATAL DIVISION.

In opening the first Session of the Native Appeal Court for the Transvaal and Natal Division, it is desirable that I should state in broad outline the judicial organisation and procedure created by Act 38 of 1927. But before doing so I should like to refer briefly to Law 4 of 1885 in its bearing upon the Native peoples of the Transvaal. It has been described from the Bench as the Charter of Justice of the Native population, *Kefas Magano* v. *Rex* (T.P.D. 1923) and as Mr. Garthorne, Under-Secretary for Native Affairs, points out in " The Application of Native Law in the Transvaal," a Charter which, as interpreted by the Court, has bastardized almost the entire Native Population of the Transvaal. *Rex* v. *Mboko* (445 T.S. 1910), has deprived practically every native father of guardianship or other rights to his children, *Kaba* v. *Netaba* (964 T.P.D. 1910), has destroyed any equitable claim in property, the passing of which to the Native mind alone differentiates marriage and prostitution (*Ibid*) and finally has so undermined the fundamental Native Customs that there is very little left as regards status, *Meesadoosa* v. *Links* (357 T.P.D. 1915), would appear to merit careful consideration.

But I think the position has been considerably retrieved in favour of the Natives by Act 38 of 1927, one of the cardinal principles of which is, that it shall not be lawful for the Courts constituted under the Act, to declare the custom of Lobola or Bohadi or other similar customs opposed to the principles of public policy or natural justice, and as I shall attempt to show in the course of my remarks this morning, the new Act 38 of 1927 under which this

Court is constituted, more nearly approximates to the concept of the Charter of Justice of the Native peoples of the Transvaal than Law 4 or 1885, since repealed.

This Court has been constituted in terms of section 13 of the Act, for the Transvaal and Natal Division and for the Cape and O.F.S. Division, each presided over by a President appointed permanently by the Governor-General, and two Members appointed by the Minister from time to time. I have been appointed to the presidency of the former and Mr. Young to the latter.

The Members of the Court other than the President are selected from Magistrates, Native Commissioners or other qualified persons. The decision of the majority of the members of the Court, shall be the judgment of the Court. Whenever conflicting decisions are given by the Native Appeal Court within its area of jurisdiction, the Minister may cause a special case to be prepared and be argued before the Appellate Division of the Supreme Court of South Africa, in order to obtain its ruling thereon, and such ruling shall thereafter be deemed to be the correct decision in the matter.

A Native Appeal Court shall have full power to review, set aside, amend or correct any order, judgment, or proceeding of the Native Commission's Court within the area of its jurisdiction or to direct a case from such a Court to be retried or reheard or to make any such order upon the case as the interests of justice may require: provided that no judgment or proceeding shall, by reason of any irregularity or defect in the record of proceedings be reversed or set aside, unless it appears to the Court of Appeal that substantial prejudice has resulted therefrom.

Notwithstanding anything in any Law contained no Appeal shall lie from the judgment of a Court of Native Commissioner in respect of an action or proceeding, expect to the Native Appeal Court constituted under section 13, unless the Native Appeal Court itself consents to an application for leave to appeal (upon any point stated by the said Court) being made to the Appellate Division of the Supreme Court, subject in any event to the rules of the said Appellate Division. Save as is provided in sections 13 and 18, the decision of the Native Appeal Court shall be final and conclusive.

The Native Appeal Court shall sit at such times and places as the Minister may in the *Gazette* appoint. The time and place appointed for the sitting of this Court is published under Government Notice No. 984.

The Native Appeal Court for the Transvaal and Natal Division was constituted in terms of the section by Proclamation No. 301 of 1928 and by Government Notice No. 2258 of December, 1928, my appointment to the presidency was published. The learned Members of this Court have in terms of sub-sections 2 and 4 of section 13 of the Act been appointed by the Minister for the purposes of this Session. The Appeal Court Rules were promulgated under Government Notice No. 2254 dated December 21, 1928.

The amending Act 1929, section 10 (1), provides for the constitution by proclamation of this Court as a Native Divorce Court, with powers and jurisdiction to hear and determine suits of nullity, divorce, and separation between natives domiciled within its area of jurisdiction in respect of marriages and to decide any question *arising out of any such marriage* which is *not cognisable* by a Native Commissioner's court established under section 10 of the principal Act.

The relative sections of Act 38 of 1927 make provision for the setting up of judicial machinery in respect of inferior courts. There are the courts of Native Chiefs and Headmen and the Courts of Native Commissioner. These Courts are of first instance with right of appeal from the former to the latter and from the latter to this Court.

The powers, functions, procedure and areas of jurisdiction of these courts and the appointment of the Chiefs, Headmen and Native Commissioners to preside over them, respectively, are embodied in the relative sections of the Act, Proclamations and Government Notices. By section 19, sub-sections 1 and 2, provision is made for the appointment of Native Assessors in an advisory capacity in cases where it is deemed desirable. The opinion of such Assessors shall be recorded and form part of the record.

Section 16 (1) provides that advocates and attorneys of the Supreme Court shall be entitled to appear in a Court of Native Commissioner and in the Native Appeal Court. Every person who is entitled to practise as an agent in a Magistrate's Court within the area of jurisdiction of a court of Native Commissioner, shall be entitled to appear in such court but in no other court of Native Commissioner.

It will thus be appreciated that by the system of judicature here outlined, embodying simple and convenient forms of procedure, stripped, as far as possible, of legal niceties and technicalities, designed to meet the needs of the situation, and one of the central

ideas of which is to bring the legal machine within easy reach of, and accessible to, the highest as well as to the lowest member of the Native community, there is secured to them an unbroken chain for the remedying of their wrongs in civil matters, with comparatively little expense.

From the Court of their Chief or Headman they may in appeal go to their Native Commissioner, and from their Native Commissioner to this Court of Appeal. That is the great open road by which they may travel in seeking redress of any wrong of a civil nature they may have suffered.

But I may say that whilst strict forms of pleadings in other courts have not been closely followed, it is not contemplated that grounds of action and pleadings in the courts of Native Commissioner and pleadings in this Court shall be other than clear, concise and comprehensive; and I am sure I may rely on members of the legal profession having cases in these courts to ensure that the canons of practice and procedure be honoured not in the breach but in the letter and spirit.

It is in the discretion of the courts of Native Commissioner in all suits or proceedings between natives involving questions of customs followed by natives, to decide such questions according to native law applying to such customs, except in so far as it shall have been repealed or modified: provided that such native law shall not be opposed to the principles of public policy or natural justice: provided further (and this is an important provision as I shall presently show) that it shall not be lawful for any court to declare the custom of lobolo or bohadi or other similar custom is repugnant to such principles.

And this brings me to a consideration of the differentiated judicial recognition of lobolo in the courts of the various provinces of the Union until this Act, very wisely in my view, make it one of uniformity. Until then lobolo was cognisable in the courts of Natal and the Transkeian Territories but not to any extent in the Cape Province proper, or the Transvaal or the Orange Free State.

It has, by the section of the Act referred to, been brought on to a definite basis of uniformity throughout the Union, and quite rightly so, for, despite the disfavour in which it is held by certain schools of thought, its underlying principle is unquestionably an integral part of the foundation on which the whole fabric of native family life and society rests.

In illustration of its meaning and significance I cannot do better than quote the definition given by Dr. Edgar Brookes in his book "History of Native Policy in South Africa," in answer to the question "What is this institution?" "Ukulobola (Ikazi Bohadi) may be taken to be a contract between the father and the intending husband of his daughter, by which the father promises his consent to the marriage of the daughter, and to protect her in case of necessity, either during or after such marriage, and by which in return he obtains from the husband valuable consideration, partly for such consent, and partly as a guarantee by the husband of his good conduct towards his daughter as wife. Such a contract does not imply the compulsory marriage of the woman."

The "Ikazi" may, upon every principle of sound law, be recoverable under such contract. It is not a contract of purchase and sale. The terms "buying and selling" are scarcely fair terms to apply in describing the transaction referred to. The property given in the case of marriage among these people forms a provision for the widow and family in case of the husband's death, which arrangement is held sacred and universally respected.

I do not think there can be any doubt that ukulobola has the sanction of the Scriptures. Or should I more correctly say it was a custom recognised by the Scriptures, referred to in Genesis as "Mohar," which does not mean buying and selling in the ordinary acceptation of the terms, and may be taken to mean in effect the equivalent which the bridegroom gives to the bride's father, for the services which she can no longer render to him, but must render to her husband.

In Genesis again, "the servant of Abraham gives to Rebecca jewels of silver and jewels of gold and raiment, but to the brother and mother, precious things." And in Deuteronomy "he shall give to the damsel's father 50 shekels of silver." The late Reverend A. Kropf, in a valuable paper written on the subject as long ago as 1873, said: From the earliest age of history Ukulobola was practised among all Oriental nations and in their migrations toward the west they brought it even to Europe, where it died away, after the new wine of the Spirit of God had thoroughly fermented in the disciples of Christ. Homer in his Illiad says of Iphiclamus: "The unfortunate, far away from his wife, never having enjoyed her charms, from whom he had given first a hundred bullocks and further promised for her a thousand goats and the same number of sheep . . . . . "—A not illiberal payment

of lobolo in this instance. The bride was apparently of royal blood.

In such unions among royally born natives there is no limit of lobolo. It is nevertheless probably true to say that owing to the modifying influences of our enactments, e.g., the Natal Code, Lobolo has lost much of its ritual character.

From the foregoing statement it is clear that it was sound policy which dictated the breaking down of these invidious distinctions in the judicial recognition of this ancient and honourable custom, and I am sure it must be so viewed by the Bantu people of this country.

Germane to this question, in view of the discretionary powers given to the courts of Native Commissioner under section II (1) to try cases in accordance with native law, is that of the fundamentals of native law.

Students of native law frequently ask—and the man in the street often asks—what is native law? Is there such a thing as pure native law? The answer to the latter is, of course there is. And it is indeed in many respects, despite the modifying influences and mutilating effects, over a century and more, of European legislation, as pure, rational, and logical a system of law as any of our systems of contemporary jurisprudence of Western civilisation.

Native law, to answer the first question last, is, again to quote Dr. Brookes, "the indigenous system of customary jurisprudence among the various Bantu tribes of South Africa. Like the Roman-Dutch law and English common law, it is customary and obviously it is unwritten. It is every whit as valuable, as fixed and as rational a system (so far as the law of persons is concerned), as Roman-Dutch law. It is misleading to speak of native law as if there were only one system of law among the whole of the South African Bantu. There are, it is true, many differences of detail from tribe to tribe but the broad principles of law involved are the same."

Parenthetically, Mr. G. P. Lestrade, an eminent ethnologist, in distinguishing these says: "Thus to give but one example of a matter of detail, on the face of it not perhaps strikingly important, but on a deeper examination of very great importance in the lives of the people concerned, we may mention the variations in the distribution of the *bogadi* cattle among the family of the woman among the BaHuruthse tribes of the Marico district: there, in an area of about three hundred square miles, and at places separated from each other by no more than fifteen to twenty miles, three distinct and mutually contradictory and exclusive systems of distri-

bution exist, each the age-hallowed and inviolable custom of the particular tribe which practises it. As a striking illustration of a variation of principle of great import from tribe to tribe, one might mention the rule observed by these same people, the BaHuruthse, that, once *bogadi* cattle have been handed over, they can under no circumstances whatsoever be returned: and this is in striking contrast to the practice of other Tshwana tribes, to say nothing of other Sotho tribes, and of all the other Bantu-speaking tribes in the Union, where the return of *bogadi* or *ikazi* or *thakha* or *lobolo* is not only possible, but even fairly common, for one reason or another. Of course more or less unimportant details may vary too, as might be instanced by the contrast between the Tshwana as against the Xosa method of determining the number of cattle to be handed over as bride-price: apparently the Xosa people deem a kind of public bargain-driving and haggling on those points as part of good manners: the Tshwana people regard such an exhibition of cupidity in public as in extremely bad taste: they too drive the bargain, but it is done in private, with delicacy and a certain avowed distaste. That a whole system may vary is shown in the case of true Thonga succession to chieftainship as against the Zulu succession: among the true Thonga, the next younger brother of the late chief must succeed: among the Zulu, his eldest son: this divergence led, by a devious route, to a bloody war between the two brothers Mawewe and Muzila. And the deep chasm between the Sotho and the Zulu system of household-grouping is too well known to need more than passing mention here."

The various Bantu tribal systems are very much closer than the systems of common law of those countries which build on the Code of Justinian. Native law does not deserve the very grave condemnation with which it is so universally visited by those who are wholly unacquainted with it or who only possess a very limited knowledge of it. It is a law suggested by circumstances, it is essentially just, and has been found effectual for the protection of individuals, and necessary for the good government of men living in a tribal condition—the background of all native law is the tribal system.

The individual is absorbed in the commonwealth, the man is lost in the citizen. The chief is the embodiment of the tribe, the head and centre of the whole fabric. The system is perfectly

understood by the natives, carrying with it mutual responsibility and suretyship and requiring implicit obedience to authority.

It embodies an unbroken chain of responsibility of the headman for his people, of the head of a kraal or family for its members and of every individual of a tribe to the Chief.

Dundas, on the other hand, gives the following strikingly simple definition:—"Bantu law is that evolved by custom, and its expounders are the old men who have learnt it by precedent and the experience of age," and this definition would no doubt make a more immediate appeal to Native administrators the majority of whom have graduated in the hard school of experience.

Natal has pioneered the codification of native law thus frankly recognising it. But the main purpose of the code, in the words of Campbell, J.P., in the case *Tekeka Badumile* v. *Ciyana* (N.H.C. Reports 1903), was to define and it must therefore be regarded as mainly affirmative and declaratory. Neither does it embrace all the juristic practices of the natives. There still remains a large body of unwritten and uncodified law behind it. It is, however, a moot point whether in the process of codification which after all is the product of a foreign mentality and environment, native law may not be the poorer in ethical, moral and logical quality. That of course is not the concern of the Courts constituted under the Act which are called upon to apply themselves to the interpretation of the law, written and unwritten, as it stands, seeking guidance and direction from the decisions given in the past by distinguished jurists of the Courts of this country.

In presenting this outline of the judicial organisation embodied in recent legislation and cognate matters, I desire to say that I do not in any sense wish to convey the impression that I claim to be an authority on native law and custom. As I stated in Natal in opening the Court there recently: I am no more and no less than a serious and ardent student of this profoundly interesting and important yet complex subject of our country. I approach the duties of my office as President of the Native Appeal Court in the spirit of humility and diffidence, with a due sense of their great importance and responsibility; for I realise, following as I shall, within the humble limits of my capacity, in the footsteps of eminent jurists of the Transvaal and Natal Provinces that the eyes of the Bantu people in general, and in the Transvaal and Natal in particular, are upon me, expecting as they will, and have a right

to, that I shall interpret the law with the closest attention to its principles and implications as known and understood by them.

The burden of one's office will more readily be understood when I indicate that this Court will preside over the destinies, in civil matters, of over three million natives, and I as President will be the only factor making for continuity and consistency in decision inasmuch as the other members of the Court will, as stated, be appointed from among Magistrates and Native Commissioners from time to time, which gives no opportunity for consultation with me beforehand, while in respect of the same area of jurisdiction there are the Supreme Courts of the Transvaal and Natal, with the addition of the Native High Court, which latter now deals only with matters of a criminal nature.

In these circumstances, I hope for the goodwill and support of the people. I cannot, of course, at this early stage expect their confidence, but in the days ahead I shall endeavour to qualify for and secure that confidence.

PANGINDAWO HLUNGWANE v. MABOZO MAPUMULO.

1929. *April* 23. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Filing of records with Registrar.—Rule 20 *of the Native Appeal Court Rules.*

FACTS: Appeal from the Native Commissioner's Court, New Hanover. Where the records have only been received by the Registrar the day previous to the opening of the session.

HELD: That Rule 20 of the Rules of Court required that the appeal should be noted not less than twenty-eight days before the commencement of the session, and as the records had only been received by the Registrar the day before the opening of such session, the President was not prepared to relax the rule, and directed that the matter stand down for hearing at the next session.

ORDER: Application is refused. The Court makes no order as to costs.

For Appellant: Mr. *R. A. Marwick*; for Respondent: Mr. *J. D. Stalker.*

1929. *April* 23. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Appeal from a magistrate.—Jurisdiction of the Native Appeal Court.—Pending case.—Sections 15 *and* 17 *of Act* 38, 1927.

FACTS: An appeal from the decision of the magistrate at Nkandhla. This was an appeal from a decision given by the magistrate, Nkandhla. The record disclosed that the action had been commenced before him in his capacity as magistrate and not as a native commissioner towards the close of last year, and concluded on the 31st of January this year. It was noted that the magistrate had signed as "Native Commissioner" when he concluded the case although he commenced it as "Magistrate." This was erroneous.

The Court of its own initiative raised the question of jurisdiction, it being apparent that in view of the provisions of secs. 15 and 17 of Act 38, 1927, it had no power to hear the appeal, being a pending case in terms of sub-sec. (5) of sec. 17.

Counsel for the parties stated that no objection would be raised to the jurisdiction of the Court, but admitted that it was not competent for the Court to deal with the matter. Case of *Nxasana* v. *Nxasana* (1921, A.D. 469), cited.

HELD: That as the case had been commenced by the judicial officer in the lower court in his capacity as a magistrate before the 1st January, 1929, and concluded by him after that date, the Court had no jurisdiction to hear the appeal in view of secs. 15 and 17 of the Native Administration Act, and that it was not competent to confer such jurisdiction by consent. The jurisdiction of the Court was confined to appeals from the decision of native commissioners only.

ORDER: Appeal dismissed, but by consent no order is made as to costs except to direct appellant to pay respondent's travelling expenses.

For Appellant: Mr. *Brokensha*; for Respondent: Mr. *L. Randles*.

1929. *June* 17. Before STUBBS, President, MANNING and HARRIES, Members of the Court.

Ejectment,—Section 41 (1) *of the Urban Areas Act.*

FACTS: An appeal from the Native Commissioner's Court, Johannesburg. Defendant (appellant) appeals against the whole judgment of the Court of the Native Commissioner, Johannesburg, ordering his ejectment from certain stands in the Klipspruit Location on the grounds that transfer was made to a European and was void under sec. 41 (1) of the Urban Areas Act, 1923. That the Commissioner's conclusion of law, that a European had no interest in the location stands was wrong; that if a European had no interest in the location stands and since the purpose of the transfer was not to make respondent owner or an interested party, respondent was nominal holder for the appellant, and is not entitled to eject him, and that the Commissioner erred in refusing to admit certain evidence to be led on appellant's behalf, confirming appellant's contention that transfer was to the respondent in name only.

HELD: That in view of the unsatisfactory features in this case, the matter be remitted for the taking of such further evidence as the parties may wish to adduce on the points raised in this Court, including that raised in the 4th ground of appeal and directs the Native Commissioner to decide the case afresh in the light of such further evidence.

The Native Commissioner's judgment is set aside. Costs of appeal to go to appellant.

For Appellant: Mr. *R. W. Msimang*; for Respondent: Mr. *I. P. Raaff.*

STUBBS, P.: In this case, on the pleadings I find it extremely difficult to determine the actual nature of the issues involved. These are largely to be inferred from the cryptic note of the nature of the defence made by the Additional Native Commissioner, the record of the evidence, the character of the cross-examination and the documentary exhibits. It is not as though we are dealing with a case involving complicated points of Native law in which some latitude in the pleadings might be expected and allowed where the parties are unrepresented by legal practitioners, but we are dealing here with a case involving principles of the ordinary law of the country which, in my view, makes all the difference.

The note of the defence in this case is as follows: " Denies any transfer of stands to plaintiff. If any document exists, denies any valid transfer in law." In a subsequent note on the record Mr. *Orkin* for the defence is reported to have argued " That his defence is that the plaintiff is not the real plaintiff." How these averments read together can be reconciled, the Court finds it extremely difficult to understand; but as no objection was taken in the court below and the point has not been raised in this Court the case as it stands falls to be dealt with upon the various aspects which present themselves.

In the Court of the Additional Native Commissioner, respondent claimed against appellant ejectment from the property of the respondent wrongfully, unlawfully, and illegally occupied by appellant. In support of his claim respondent relies on transfer permit dated 21st June, 1926; by location rent receipts given in respondent's name; by the document dated the 4th of December, 1926, signed by appellant; by the location inspector's notice to vacate dated the 4th January, 1929, and by letter of demand dated 1st March, 1929. Respondent himself gave no evidence; and by the evidence led, there is undoubtedly a *prima facie* case made out in respondent's behalf.

Appellant in support of his case relies on the fact of his having been in undisturbed occupation from the 24th February, 1924, and from the date of alleged transfer, namely, 21st June, 1926, to the present time. Not only has he been in occupation himself but he has also sublet portions of the property. The rentals to the municipality would appear to have been paid by him, although the evidence on this point is not very clear.

The letter of the 30th June, 1926, signed by the Reverend Mr. Kidwell after the alleged date of transfer at which Kidwell is alleged to have been a witness, refers to " your property " although this may of course have reference to a time when the property sold was owned by appellant.

Again, in the document marked F, appearing on page 14 of the record, reference is made to " the property of Thomas Mafane " although this document is dated after the alleged date of transfer.

It is reasonable to assume from a reference to the documents that the transfer permit is valid evidence of transfer under the Regulations. The receipt No. 4979 also supports this.

On the other hand the document on page 9, dated 4th December, 1926, might be taken to support the evidence of Oliver, that tenants

sometimes transfer properties in the location to avoid an interdict, but without an explanation in evidence as to the true meaning of this document, it must be taken that it is merely evidence of that which it sets forth and as such it undoubtedly supports the transfer.

The Court confesses to some difficulty in interpreting the letter of demand dated 1st March, 1929, on page 10 of the record, the last paragraph of which requires explanation as there is nothing to support the contention that Ilsley was the previous owner nor that he had given appellant notice to vacate.

The document D on page 12 of the record supports the contention of appellant that he was indebted to Ilsley and Kidwell and that the document signed by him on the 21st June, 1926, was intended to be merely a transfer of the income or rents of the property as security for payment of this indebtedness, which is more fully set out in the various documents, especially that marked E on page 13 of the record.

Appellant's contention is further supported by the document marked F on page 14 (1) of the record; similarly the document appearing on the next page of the record. also marked F on page 14, and similarly the letter of Kidwell dated the 30th June.

Accordingly the Court at this stage is inclined to the belief that there may be a good deal in the evidence that appellant on the 21st June, 1926, only intended to pledge the income of his property as security for the due payment of his indebtedness to Kidwell and Ilsley, more especially as appellant was left in undisturbed possession of the property for so long a period.

Why the respondent only now moves for the ejectment of appellant, does not appear in the record.

In all the circumstances I think the evidence for the respondent sets up a *prima facie* case against appellant, but it is rebutted by the evidence of appellant supported by the probabilities in the interpretation of the various documents filed of Record and the Court takes the view of the possibility that defendant on the 21st June, 1926, transferred the stand in error thinking he was transferring only the income thereof to respondent as agent or representative of Ilsley and Kidwell, as they, being Europeans, could not directly have an interest in the township, purely to secure payment of his debt to them. In this connection it is not explained why respondent should have left appellant in undisturbed possession for so long and there is also no evidence of any consideration whatsoever for the transfer of the stand by appellant

to respondent. There is also no evidence of the value of the stand to support the possible contention that, as appellant has failed to pay his instalments to redeem his debt, that Ilsley and Kidwell were now getting their agent or representative to enforce a lien which they could hold over the property by virtue of the transfer in his name, namely, by ejecting appellant.

Respondent did not give evidence and appellant had no opportunity of cross-examining him. The evidence on material points is meagre and inconclusive and there is the further fact that respondent closed his case after establishing merely the barest case against appellant and still reserving to himself the right to call rebutting evidence if necessary. From the appellant's evidence it was necessary that respondent should have had the *onus* cast upon him to establish his case more definitely.

In view of these unsatisfactory features the Court considers it proper to set aside the judgment of the Native Commissioner in the lower court and to remit the matter for the taking of such further evidence as the parties may wish to adduce on the points raised in this Court including that referred to in the fourth ground of appeal and directs the Native Commissioner to decide the case afresh in the light of such further evidence.

Costs of appeal to go to appellant.

Harries and Manning, Members of Court, concurred.

MOHALE MOLEPO v. MAPHUTI MAKOELI.

1929. *June* 17. Before Stubbs, President, Manning and Harries, Members of the Court.

Claim for donkey.—Possession a presumption of ownership.—Onus *of proof.*

Facts: An appeal from the Native Commissioner's Court, Pietersburg. In the court below plaintiff, respondent in appeal, claimed from defendant, appellant in appeal, the return of a donkey, which defendant held as his own.

Judgment was given for plaintiff with costs. Appeal was noted against this judgment on the grounds that the judgment was bad in

law, as there was no evidence to show that the donkey foal claimed by plaintiff, now respondent, was the donkey in question, while there is evidence to prove the donkey foal to be the property of defendant, now appellant.

Held: That possession by appellant raised the presumption of ownership. The *onus* being upon respondent to establish a better title. That the evidence as it stands on the Record should have created a doubt in the mind of the Additional Native Commissioner and he should have granted absolution from the instance thus leaving it open to plaintiff to bring a fresh action with, if possible, fuller and more conclusive evidence, likewise giving to defendant the opportunity to bring all the evidence he may have at his disposal including that of Hutton.

The judgment of the lower court is therefore altered to one of absolution from the instance with costs in both Courts in favour of appellant.

For Appellant: Mr. *J. G. Silke*: for Respondent: Mr. *J. S. Hull*.

Stubbs, P.: The action was brought in the Court of the Additional Native Commissioner at Pietersburg by Maphuti Mokoeli against Mohale Molepo for the recovery of a female donkey foal alleged to have been found in possession of Molepo, the defendant.

The Additional Native Commissioner gave judgment for Mohale Molepo with costs.

The judgment is brought in appeal on the ground—

(1) That the judgment is bad in law, and that

(*a*) There is no evidence to show that the donkey foal claimed by plaintiff is actually the donkey foal in the possession of the defendant.

(*b*) There is sufficient evidence to prove that the donkey foal now claimed is the property of the defendant, its mother having died while being used by the witness Daniel who will substantiate the defendant's evidence and is further supported by Sekoapa.

The facts as laid by the plaintiff (respondent) are that she lives on Hutton's farm. The donkey foal with mother ran away to Hutton's Camp. Plaintiff went to the camp in search and found the foal in defendant's possession. It is grey in colour. Witness Johannes knows the donkey foal claimed by plaintiff—a grey one. He had seen it at plaintiff's kraal and some days after he saw it

at defendant's kraal. He described it as being about three months old. In cross-examination by defendant he states defendant told him his (defendant's) donkey was dead—the mother of the foal in dispute. Izaak who lives on Hutton's farm testifies to having been asked by defendant " about a month ago " to do his work during his absence to see his wife and that on the following day defendant returned with a young grey donkey and he volunteered the information that the mother was dead. He does not know where the donkey came from. He knows plaintiff claimed the donkey. In answer to the Court he states the donkey foal he speaks of was never at defendant's kraal.

The defendant claims the donkey as his property. He states plaintiff's is dead. It died in the camp. Hutton had seen the dead donkey in the kraal. It had been at his kraal all the time. The mother was dead. Daniel lives at Hutton's farm. He had the year before borrowed a donkey from defendant. It had a foal—a grey foal, the foal was about two months and fifteen days old. The foal is with the owner. Sekoapa states: The donkey foal at defendant's kraal is his (defendant's). The mother died while his mother was ploughing for his brother Daniel. The evidence is lamentably meagre on material points.

Defendant was in possession, therefore the presumption is that he was the owner. The *onus* lay on plaintiff to prove conclusively that the foal was his property. Has he discharged that *onus*? I do not think so. Plaintiff does not in evidence fix the age or sex of the donkey, nor is there any evidence to show whether or not it had any ear-marks or distinguishing marks of any description. She does not say whether she reported the circumstance to Hutton on whose farm she lives, a very natural and probable thing to have done. Johannes, beyond stating that he knows the donkey foal claimed by plaintiff and had seen it at his kraal and later at defendant's kraal and that its age is about three months, does not say definitely that he knows the donkey in question is the property of plaintiff.

Izaak states he knows plaintiff claimed the donkey. How does he know this? There is no evidence that plaintiff ever went to defendant who was in possession and said: " The donkey now in your possession belongs to me, I claim it as my property " or words to that effect. If, as Izaak states in answer to the Court: " The donkey foal I speak of was never at defendant's kraal " how then according to plaintiff's evidence was defendant found in

possession? The age of defendant's donkey foal according to Daniel's evidence is much the same as plaintiff's donkey. There is no evidence that the donkey foal in question was produced before the Court for purposes of identification by the witnesses. There is no evidence to show where defendant lives and where Izaak in relation to defendant lives. For example, if they and other witnesses live in neighbouring kraals where it is likely that things of everyday occurrence would be common knowledge among them, such points as " the donkey foal was never at defendant's kraal," might be explained by Izaak living so close to defendant as to be in view of his kraal and to know something about the movements of animals at that kraal. Hutton who might have thrown a good deal of light on the matter was not called. The Additional Native Commissioner seems to have relied very largely on Izaak's evidence in coming to the conclusion that the donkey foal in question was the property of plaintiff, and he goes on to say " the circumstances surrounding the return of defendant with a young donkey early one morning are not free from suspicion . . . . . Izaak uses no such words as " early one morning." The words he uses are " Next day he returned with a young grey donkey." Mere suspicion coupled with flimsy evidence, some of which is circumstantial, is not sufficient to oust defendant's title. With the evidence at her disposal plaintiff has in my view failed to establish a better title to the donkey foal than defendant who had possession.

The evidence as it stands on the Record should have created a doubt in the mind of the Additional Native Commissioner and he should have granted absolution from the instance, thus leaving it open to the plaintiff to bring a fresh action with, if possible, fuller and more conclusive evidence, likewise giving to defendant the opportunity to bring all the evidence he may have at his disposal including that of Hutton.

HARRIES, Member of Court: In concurring I wish to add that while this Court is reluctant to disturb a finding on fact this trial strikes me as somewhat haphazard.

Apparently the donkey foal in question was never before the Court. Had it been it is possible that the witness Johannes might have found it difficult to satisfy the Court as to his means of identifying it as plaintiff's property. In his evidence this witness says " I know the donkey foal claimed by plaintiff, a grey one. I saw it

at his kraal and some days after I saw the same foal at defendant's kraal, about three months old." How does he know that the foal he alleges he saw is the one plaintiff claims? He does not even state the sex of the foal he knows. All adult donkeys of a similar colour look much alike and are not easily identified if not branded or ear-marked. Donkey foals of similar colour and sex are still more difficult to distinguish from one another. Native Izaak's evidence merely goes to show that defendant returned one day with a young grey donkey. Plaintiff, he says, told him its mother was dead. The Native Commissioner in his remarks stresses the point that defendant made no mention of going to fetch a donkey. He must be assuming this, because Izaak's evidence does not show that no such mention was made. How does Izaak know that plaintiff claimed the donkey?

Defendant is just as emphatic about being the owner as plaintiff is, and he is supporting Daniel and Sekoapa.

Why was Hutton not called? See defendant's evidence—

Neither party was represented and the evidence appears to have been cut too short—unduly so. I feel that the Native Commissioner might easily have extracted more elucidative evidence had he wished to do so. In his reasons for judgment he states that the approximate time defendant took over his donkey foal from Daniel after its mother's death is not given? Why did he not have the point cleared up by asking the witnesses to state the time?

From the evidence on record it seems to me the Native Commissioner erred in his judgment.

I cannot see how he could not have had a reasonable doubt about the true facts of the case or why he accepted the evidence of plaintiff and his witness in preference to that of defendant and his. The judgment should have been one of absolution from the instance.

MANNING, Member of Court: I concur.

1929. *June* 17. Before STUBBS, President, MANNING and HARRIES, Members of the Court.

Husband and wife.—First marriage by Christian rites.—Second marriage by Native custom.—Recognition of customary unions in the Transvaal prior to the promulgation of Act 38, 1927.——*Claim for dissolution of latter union and for* lobolo. *Law* 3, 1897 (*T.*)—*Union* contra bonos mores.

CLAIM: Dissolution of marriage and forfeiture of *lobolo*.

COUNTERCLAIM: Restitution of conjugal rights or return of *lobolo*.

FACTS: An appeal from the Native Commissioner's Court, Wakkerstroom. Respondent contracted a Christian marriage under Law 3, 1897 (T.) in 1916, and in August, 1927, entered into a customary union with appellant, before Act 38, 1927, came into operation.

HELD: That once a Christian marriage had been contracted under the provisions of Law 3, 1897 (T.), it was not competent for the husband to enter into a customary union, as this was repugnant to the principles of the said law and to public policy; that the union was, therefore, illegal and that neither party was entitled to relief in any court of law.

The judgment of the lower court, granting a dissolution of the customary union in favour of the present appellant, and awarding respondent the return of *lobolo* paid on her, set aside with costs.

Quaere: Whether the recognition of *lobolo* claims by Act 38, 1927, was of retrospective effect or not.

For Appellant: Mr. *F. Kleyn*; for Respondent: Mr. *H. Sausenthaler*.

STUBBS, P.: The summons in the Court of the Acting Additional Native Commissioner at Wakkerstroom, set out the following ground of action:—

(1) Plaintiff (Emma Mkwanaza) is the second wife of defendant (Johannes Twala) in accordance with Native custom. Defendant having paid nine head of cattle and one horse to plaintiff's brother as *lobolo*, during October, 1926.

(2) Plaintiff now claims dissolution of the marriage and the forfeiture of the said *lobolo*, on the ground that defendant has deceived her by not informing her that he was married

to his first wife by Christian rites, and further the defendant for the past 13 months has not cohabited with her in accordance with Native custom and has neglected to support her and the child of the marriage (since deceased).

(3) Costs of suit—In answer to this claim defendant pleads denial of all allegations made by the plaintiff and claims in reconvention restitution of conjugal rights or return of the *lobolo* paid by him to co-plaintiff.

By the consent of the parties Enock Mkwanaza, plaintiff's guardian, is joined in the action as co-plaintiff.

In the claim in convention and the claim in reconvention the Acting Additional Native Commissioner gave the following judgment:—

JUDGMENT for the defendant. The marriage is set aside. Nine head of cattle and one horse paid to co-plaintiff, Enoch Mkwanaza, to be returned forthwith. Plaintiff to pay costs.

The appeal is brought on the following grounds: (1) That the judgment is against the weight of evidence. (2) That the judgment is bad in law in that:—

(*a*) By reason of the marriage according to Christian rites by the defendant and Etta Nkosi, the subsequent union between the defendant and the plaintiff, Emma Mkwanaza, was immoral and illegal, and that the Court should not have made any order in respect of such union.

(*b*) That when the cattle and horse claimed were handed to the co-plaintiff as *lobolo*, the practice of *lobolo* was not recognised as valid in law and, therefore, the Court erred in making an order for the return of the cattle.

(*c*) That the plaintiff should not have been ordered to pay the costs.

The judgment as it stands is hardly intelligible. It was plaintiff not defendant, who asked for the setting aside of the so-called marriage.

I suppose what the Acting Additional Native Commissioner meant by his judgment was that on plaintiff's claim for forfeiture of the *lobolo*, judgment would be for defendant in terms of his alternative claim in reconvention. He is, however, silent on the prayer for restitution of conjugal rights on the claim in reconvention, but at any rate it may be taken he rejected that in favour of

the alternative claim. It is obvious he granted plaintiff's prayer for dissolution of marriage and, as he says in his judgment in convention, awarded costs against plaintiff.

The facts are that Johannes Twala, the defendant (appellant), in 1916, married by Christian rites Ettie Nkosi and by her has had a number of children, four living. During the subsistence of this marriage in August, 1927, a union was formed between him and Emma Mkwanaza, for whom he paid *lobolo* to her guardian, Enoch Mkwanaza, co-plaintiff. Because of Johannes Twala's alleged refusal to cohabit with her and his alleged neglect and ill-treatment of her she left him and returned to her guardian, Enoch with whom she now resides. In her own words in her evidence in support of her claim, she states: "My reasons for divorce are that defendant flogs me, does not have connection with me and does not support me, that is all."

It is common cause that at the time Emma went to live with Johannes as his second wife, she had knowledge of his marriage with Ettie.

Two points of law emerge in this case and call for decision. The first is, was it competent for the court below to grant dissolution of the marriage, so-called, between Johannes Twala and Emma Mkwanaza and the second is, assuming the first to be answered in the negative, was Johannes Twala entitled in law to succeed on the alternative claim in reconvention, namely, for the return of the nine head of cattle and one horse paid as *lobolo*?

It is clear that the marriage by Christian rites of Johannes Twala to Ettie Nkosi took place in 1916, and that the *lobolo* union with Emma Mkwanaza took place in 1927. In view of the knowledge of the parties of the subsistence of the former, was the union of Johannes and Emma such a union in law as to entitle Emma to the relief sought and obtained?

A customary union is defined in Act 38, 1927, sec. 35 as "a marriage according to Native law and custom." This case was decided in the Native Commissioner's Court on the 3rd of April, on the same date by notice in the *Gazette* No. 9 of 1929 the foregoing definition was deleted and the following substituted: "Customary union means the association of a man and a woman in a conjugal relationship according to Native law and custom, where neither the man nor the woman is party to a subsisting marriage."

The Native Commissioner from his remarks in his reasons for judgment seems to have been guided by the former without knowledge at the time of its substitution by the latter. He says: "In *Union Gazette Extraordinary*, dated the 3/4/1929, and received at this centre on the 8th April, 1929, Act 9, 1929, was promulgated, which contains certain amendments of the Native Administration Act. The definition of a customary union being entirely altered. The new definition is as follows: A customary union means the association of a man and a woman in a conjugal relationship according to Native law and custom where neither the man nor the woman is a party to a subsisting marriage.

It is clear that under the amended definition of a customary union, the present judgment could not have been given and that the Legislature has seen fit to decide the very point on which the Court was doubtful, and I submit that on the definition of a customary union as it stood, prior to the amending Act, the union between plaintiff and defendant in this case could be considered as a binding union in accordance with Native custom."

It is important to observe that the marriage and subsequent *lobolo* union took place at a time before the functioning of the Courts constituted under the Act of 1927, but of course the action arising out of the Johannes-Emma relationship was brought in March, as stated, and decided on the 3rd April of this year.

In the cases *Mashai Ebrahim* v. *Mahomad Essop* (1905, T.S. 59) and *Nalana* v. *Rex* (1907, T.S. 107), a definition was given of legal marriage. It was there laid down that—"with us marriage is the union of one man with one woman to the exclusion, while it lasts, of all others." And that definition is inconsistent with the idea that Emma in the present case is the second wife of Johannes under Native law and custom. Even viewed in the light of a customary union as defined by sec. 35 of Act 38, 1927, I cannot imagine a more striking example of a custom, which permitted a union with Emma while a legal marriage with Ettie subsisted, as being more inconsistent with the general principles of civilization recognised in the civilized world. It was held in *Marroko's* case (*Hertzog*, 110), based on sec. 2 of Law 4 of 1885, which has since been practically overrulel by the subsequent cases of *Nalana* v. *Rex* and *Rex* v. *Mboko* (445 T.S. 1910), that so long as a Native who had contracted a marriage according to Native custom with one woman, did not marry a second woman, such a marriage was

not inconsistent with the general principles of civilisation. It was held in *Nalana's* case that polygamous marriage by Native custom was inconsistent with the general principles of civilization because it was in essence a polygamous marriage allowing the man to marry a second or third time during the subsistence of the first union.

If, then, as was laid down in *Marroko's* case, a Native contracts a marriage according to Native custom with one woman and if by the same custom he marries another woman such later union is held to be inconsistent with the general principles of civilization and, as in wider degree held in *Nalana's* case, a polygamous marriage allowing a man to marry a second or third time during the subsistence of the first union, is inconsistent with the principles referred to, surely no matter how we may attempt to read into the definition of "customary union," in sec. 35 of Act 38, 1927, before amendment, sanction for the subsequent union of Johannes with Emma, it is in view of the subsistence of Johannes' legal marriage with Ettie convincingly inconsistent with the general principles of civilization, sec. 11 (1) of Act 38 of 1927 notwithstanding? But had the first marriage been by Native custom or, in the language of the Act, "a customary union" the legal position in regard to the second union may have been entirely different. In my view the relationship of Johannes and Emma amounted in the circumstances to one of adultery and she lived with him in concubinage.

In any event, any doubt there may have been on the legal aspects of this union has been set at rest by the amended definition of "customary union" referred to.

There is no evidence on the Record that a form of marriage by Native custom was gone through by the parties. It is difficult to make out from the Record to what tribe or tribes the parties belong. Had there been evidence on the point it might have been determinable if by the custom of such tribe or tribes a form of marriage ceremony is observed.

I think, having regard to the facts, it has been conclusively shown that the first point of law must be answered in the negative.

The second point may be briefly answered in the negative as well for the following reasons:—

Both Johannes and Emma knew or ought to have known, they attended religious services together, she claims to be a Christian, and Johannes must have known the religious and civil nature of

the obligations of his marriage with Ettie. (The enjoinment in sec. 5 of Law 3 of 1897 leaves no room for doubt on the point) that their relationship was irregular and immoral. Johannes paid *lobolo* with his eyes open. That *lobolo* was incident to a union unsanctioned by law. It was consideration given for future immoral cohabitation with Emma. There is in this case in law a *par delictum* and the claimant cannot prevail over the possessor. That being so, Johannes must fail on his claim in reconvention for the recovery of the *lobolo*.

The judgment of the Acting Native Commissioner on the claim in convention and reconvention is therefore set aside, with costs in favour of appellant.

Manning, Member of Court: Without going into other aspects of this case which have been referred to in the judgment delivered by the President, I think that the question of Native marriages and other unions, especially in the Transvaal, might be further dealt with here.

Law 3 of 1897, the law still governing marriages between Natives indicates from its preamble that it is designed *inter alia* for Natives "who by . . . . civilization have become distinguished from barbarians, and who therefore desire to live in a Christian and civilized manner and accordingly wish to be lawfully united in marriage." Sec. 5 thereof obliges marriage officers "clearly and emphatically to expound and explain to the parties the moral and legal significance of the marriage."

This law provides for marriages between Natives according to the regular laws of the State and carries practically the same obligations as those applicable to Europeans.

Prior to the coming into force, with the exception of chap. V. and sec. 36, on 1st September, 1927, of Act 38, 1927 (Native Administration Act), there was a doubt at least as to the legality or rather the right of recognition in Native Commissioner's Courts of unions entered into by Natives according to their laws and customs within the Transvaal and in one case, for instance, which came before the Supreme Court, viz., *Kaba* v. *Ntela* (T.P.D. 964, 1910, L.L.R. 706), it was held as regards the Transvaal that a marriage according to Native custom being polygamous and not legally recognised no action could be maintained for recovery of *lobolo* paid in consideration of such marriage.

Sec. 11 (1) of Act 38, 1927, now provides that it shall not be lawful for any Court to declare that the custom of *lobolo* or *bogadi* is repugnant to the principles of public policy or natural justice. Therefore as from 1st September, 1927, there is no doubt as to Native Commissioner's Courts having jurisdiction in *lobolo* questions.

A vital point is whether after Johannes had entered into a marriage with Ettie according to Law 3 of 1897 and during the subsistence of such marriage (which still subsists), he had a legal right to enter into a *lobolo* union with another woman, viz., Emma, and in case of a breach of this latter contract or agreement could he or Emma come to a court of law for recognition and a remedy?

Sec. 35 of Act 38, 1927, interprets " customary union " (*lobolo* union) as a marriage according to Native law and custom and this interpretation held until the coming into force on 3rd April, 1929, of the amending Act 9 of 1929, wherein under sec. 9 (*a*) the definition is " the association of a man and woman in a conjugal relationship according to Native law and custom where neither the man nor the woman is a party to a subsisting marriage." Under sub-sec. (*b*) of the said section " Marriage " means " the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages but does not include any union contracted under Native law and custom . . . . ." The definition under sec. 9 (*a*) Act 9, 1929, makes it clear that a " customary union " is not recognised where a " marriage " already subsists but although the court below, in this case, gave judgment on the same day as this provision became law, April, 1929, the customary or *lobolo* union was of course entered into prior to such provision and the point is whether it should therefore be regarded as entitled to recognition by our Courts or not. Chapter V of Act 38, 1927, came into operation on 1st January, 1929, and with it sec. 22 (1) which provides that no male Native shall during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first made a declaration before a Magistrate or Native Commissioner, the name of every such first-mentioned woman, every child of such union, particulars as to the property, etc., alloted to each such woman or house under Native custom. Sub-sec. (3) provides for a declaration that the provisions of sub-sec. (1) have been complied with before a marriage officer may

solemnise the marriage. Severe penalties are provided for contraventions of these provisions.

The Legislature thus evidently intended expressly to safeguard the position of any women married according to Native custom before the man enters into a marriage according to Christian rites with another woman and although the law had, previous to 3rd April, 1929, been silent on the point as to whether parties to a Christian rites " marriage " could subsequently contract a " customary union " during the subsistence of the " marriage," the fact that the general laws governing " marriages " between persons of any race, regard such as binding and official besides making bigamy a criminal offence and laying down that cohabitation with any other person than the husband or wife of the marriage is a legal ground for divorce and other marks of legal disapproval, would evidently preclude our Courts from recognising any actions arising out of separate unions or agreements to cohabit entered into subsequent to and during the subsistence of a legal marriage between different parties.

This view is strengthened by the preamble to Law 3 of 1897 referred to by sec. 5 thereof and the second paragraph sec. 11 (1) of Act 38, 1927, laying down that the Native law decided upon in the discretion of the Court of a Native Commissioner shall not be opposed to the principles of public policy or natural justice, e.g., if a Court were to order a woman to return to the man who had paid *lobolo* for her during the subsistence of his " marriage " with another woman according to European law (as in the case now before this Court) and if the woman were to comply, what would be the position of the married wife, viz., of the " marriage " should she wish to institute proceedings for divorce on the grounds of adultery by her husband? Could not the latter set up as a defence that a competent Court had ordered the lobolaed woman to return to him and in effect that he should receive and live with her? The return of the woman to him would be the first alternative according to Native law and custom, before he could claim refund of *lobolo* on her failure to comply? Other complications are conceivable. If a man or woman married according to Christian rites in the Transvaal were to be allowed with the Court's sanction to enter into further alliances the whole object of the Marriage Law, 3 of 1897, would be defeated.

Defendant by his marriage with Ettie must be presumed in law to have abandoned his own Native laws and customs in regard to *lobolo* unions after such marriage. For these reasons I am of opinion that a *lobolo* union entered into subsequent to and during the subsistence of a marriage between different parties cannot be recognised by our Courts.

They were both, though perhaps unwittingly, party to an arrangement which cannot be recognised by a court of law and they did so at their own risk in the eyes of the law.

Although the woman should be free to return to her guardian if she or he wishes this, no order can be made in the matter and similarly no order can be made for the return of the *lobolo* paid.

I therefore concur in the judgment of the President.

HARRIES, Member of Court: I concur.

PHILIP PELA v. JANETA.

1929. *June* 18. Before STUBBS, President, MANNING and HARRIES, Members of the Court.

Assault.—Claim for damages.—Counterclaim for damages for assault and malicious injury to property.—Provocation.—Assessment of damages.—Absolution.—Costs.

FACTS: An appeal from the Native Commissioner's Court, Krugersdorp. *Claim*: for £50 damages sustained by the appellant by reason of the respondent having struck the appellant with an axe on the head causing a serious wound, necessitating the appellant having to go to hospital. *Counterclaim* by respondent for £25 damages suffered through appellant having on the same date damaged respondent's furniture with an axe and also causing personal and bodily injuries.

The judgment of the Native Commissioner was one of absolution from the instance in both claim and counterclaim and for £4 6s. 0d. in favour of respondent for her furniture and costs.

HELD: That the assault, although under some provocation, was held in law to be insufficient to entirely exculpate respondent and entitles appellant to recover compensation, to be computed on the basis of appellant's minimum earning capacity of £2 per month, calculated over a period of $3\frac{1}{4}$ months, the period of his incapacitation.

The judgment of the court below is altered on appellant's claim to one of £6 10s.

The appeal on the counterclaim, as allowed by the Native Commissioner, is dismissed.

Costs: The order as to costs in the court below is altered to one in which each party shall pay his own costs as each has succeeded proportionately on the claim and counterclaim. No order as to costs on appeal.

For Appellant: Mr. *J. H. Humphreys*; for Respondent: Mr. *C. Nathan*.

Stubbs: P.: The claim is for £50 damages sustained by the appellant by reason of the respondent having on or about the 16th December, 1928, struck the appellant with an axe on the head causing a serious wound necessitating the appellant having to go to hospital, and costs.

To this action respondent sets up a counterclaim for £25 damages suffered through appellant having on the same date injured and damaged respondent's furniture with an axe and also causing her personal and bodily injuries by pushing her on to a stove, and costs.

The plea admits the assault as under provocation; denial of the counterclaim is pleaded.

The allegations as set out in the record are that Phillip Pela, the appellant, at about 2.30 p.m. on the 16th December, entered Janeta's (respondent) room and an altercation occurred between them which led to Janeta striking him with an axe on the head and he by way of retaliation broke up her furniture with an axe, slapped her face and pushed her on to a brazier.

The injuries received by appellant necessitated his admission to hospital for treatment in respect of which he claims damages in the sum of £50 and the £25 for the damage done by appellant to her furniture and other personal and bodily injuries referred to.

The appeal is brought by appellant on the ground:—

(1) That as far as the facts are concerned which the Native Commissioner says were found to be proved, whether the appellant was under the influence of liquor or not does not affect the point in issue. He could not have been so bad, because Mr. Dowdeswell sent him to the police station without any escort or assistance, over a mile away.

(2) That whether Janeta was sober or not also does not affect the question.

(3) That with regard to No. 3 of the facts the wound caused to the appellant necessitated his being taken and kept in the hospital for some time and there were apparently only slight marks on one of the arms of the respondent. Clearly the evidence of Mr. Dowdeswell with regard to fact 4. was not correct when he says that everything was smashed up. This is not what the respondent says.

(4) That it is quite clear that the appellant could not have been drunk when he entered defendant's room.

(5) That with regard to clause 7, that if there was no independent witness to prove who the aggressor was and as the Court, not being satisfied as to who the aggressor was, granted absolution both with regard to the appellant's claim for damages as well as the respondent's claim for damages, he had no right to say that the appellant was the one who caused the damages to the movable property in the room. The respondent if she wished to prove it could have called her friend Maduna to show that the appellant had caused this damage if such had taken place, whereas she did not, and the evidence of the appellant and Dora goes to show that the appellant did not cause this damage.

(6) That the evidence given by Mr. Dowdeswell to the effect that there was only one outside door to the two rooms, he admits now, was incorrect and as both the appellant and Dora had sworn there were, the Native Commissioner disbelieved their word and naturally it influenced him with regard to their other evidence too.

(7) That the evidence of the respondent is not corroborated in any way whereas the evidence for the appellant is corroborated by Dora and therefore, must be accepted as against that of Janeta who is an interested party.

(8) That the judgment in the matter is contrary to the evidence and to the law.

(9) That the doctor's evidence was quite clear that the wound caused to the appellant was caused by a sharp instrument and therefore, as a bottle is not a sharp instrument the evidence of the respondent cannot be accepted on that point and if not on that point then not on other points as well, where contradicted by the appellant alone or with his witness.

(10) That the counterclaim claimed injury to furniture outside of bodily injuries whereas judgment has been given for plates, cups, sheets and pillow-cases, which was not claimed for, therefore, that is illegal.

There is force in the argument: whether appellant was drunk or not is not involved in the issues, but the fact might conceivably have influenced conduct in respect of acts which if he had been sober were not likely in the circumstances to have occurred, for example, the breaking up of the furniture, if respondent's version is to be believed, might, if there had been no other cause, conceivably have been the act of an intoxicated person. I do not think on the evidence adduced for appellant there can be any doubt that the assault on him by respondent was made with an axe. In support of this there is his own evidence in which in cross-examination he says: "I saw the axe when I entered the room, it was under the table," the evidence of the district surgeon, Dr. Verster, who states: "The wound was caused by a sharp instrument. It was about $4\frac{1}{2}$ inches long exposing the bone"; the evidence of Dora: "I found Philip standing there with blood streaming from his face," and Joseph Dowdeswell, Location Superintendent, states: "I saw an axe and a bottle in Janeta's room." This witness entered her room some time after the occurrence of the alleged assault and damage to the furniture. Respondent denies having struck appellant with an axe, but admits having struck him with a lemonade bottle. It is in my view highly improbable that a blow with a lemonade bottle, unless it broke, could have caused the severe wound described by Dr. Verster.

There is no evidence that the lemonade bottle broke. It seems probable that the bottle seen by the Location Superintendent in respondent's room was the only one in the room and it was unbroken. Respondent admits there was an axe, but she does not know where it came from. She states: "Phillip then broke the furniture with an axe." The evidence, then, convincingly points to the presence of an axe in respondent's room and, as against the uncorroborated evidence of the respondent that the wound was caused by a lemonade bottle, this evidence must be believed. It seems to me clear from the evidence that what happened was this: Appellant, invited or uninvited, entered respondent's room, they were known to each other, he may or may not have been under the

influence of liquor, the probability is he was, a difference between them occurred—it is probable he called her a prostitute, she slapped his face, he pushed her and she fell against the brazier and she in retaliation assaulted him with the axe causing the wound described by the District Surgeon. Now we have here the physical provocation offered by her in the first instance of slapping his face, he pushing her and her fall against the brazier and finally her retaliation, and it is for the Court to say whether the provocation received was of such a nature as to justify in law her use of the axe. In face of the rule of law that force may only be repelled by like force and although the provocation received by respondent must be taken into consideration, I am not entitled to say she is entirely exculpated. The blow from the nature of the wound must have been a severe one and undoubtedly appellant as a result has suffered incapacitation and loss of work for which he should receive some measure of compensation. The difficulty is to assess the actual damage suffered. He states in evidence he earns from £2 to £4 per month as a mender of trousers and shirts which is not constant employment. He was admitted to the hospital on the 16th December, 1928. There is no evidence how long he remained in the hospital and by whom the charges were met. There is no evidence of the length of time he was incapacitated. I assume he was fit to resume his trade after his discharge from hospital. The date of his summons is 28th December, 1928, he was then still in hospital. The action was begun on the 25th March, 1929. It might be taken he was on that date capable of resuming his trade. In view of the uncertainty created on these points the question arises whether the case should not be sent back to the Court of first instance for evidence to be taken thereon or as the claim is for an amount of £50 this Court should decide this point now, assessing the measure of compensation having regard to the provocation received and resultant mitigation? I am of opinion that to avoid unnecessary delay and expense the latter course is preferable. Having regard, then, to the nature of the provocation received and the surrounding facts I have come to the conclusion that the compensation should be computed on the basis of appellant's minimum earning capacity of £2 per month for the period of his incapacitation calculated from the day following his admission to hospital to the day before the action was commenced in the Native Commissioner's Court which would mean three months and seven days the total of which is £6 10s.

The judgment in the court below is accordingly altered on appellant's claim to one of £6 10s.

With regard to the appeal on the counterclaim, although I disbelieve respondent's evidence as to the instrument which caused the wound I have no difficulty in accepting her evidence that appellant caused the damage to her furniture in which the other articles are rightly included as incidental to the furnishing of a dwelling. There is no direct denial in evidence by appellant or his witness Dora that he damaged the furniture in the manner described by respondent. He merely contents himself with the following bare denial of the counterclaim: "In regard to the counterclaim for £25, I did not push Janeta on the stove. . . . She has no stove in her room." The Location Superintendent's evidence which fully described the wrecked condition of the furniture adds to the credence which should be given respondent's evidence. Who else but appellant on the facts could have wrecked the furniture? Who in the circumstances would be more likely than he to have done the damage. It could not have been Dora. It certainly could not have been Maduna for he left soon after the difference occurred between the parties. Besides, they could not have had the motive that appellant would have for the act, what more likely after he had received the blow on the head with the axe than that he should "see red" as it were, and smash up the furniture in the room belonging to his assailant with the axe which had been used against him?

I think the probabilities of this being the true position are irresistible and the evidence should be accepted as establishing respondent's case on the counterclaim as allowed by the Native Commissioner. The appeal on the counterclaim is, therefore, dismissed.

In the matter of costs, the order as to costs in the court below will be altered to one in which each party shall pay his own costs, as each will have succeeded proportionately on the claim and counterclaim and, on the appeal, as the appellant has succeeded in his claim, but has failed on the counterclaim he is not entitled to the costs of appeal, there will therefore be no order as to costs in this Court.

Manning, Member of Court: In concurring with the findings of the President of this Court, I would say that in regard to the award for the assault on appellant I have to do so very reluctantly

as I consider that Phillip by his general behaviour brought much of the trouble upon himself. However, on a point of strict law the question has to be considered, in addition to what has already been mentioned, was respondent in such personal danger as to justify the use of a weapon formidable enough to cause the serious wound described by the district surgeon? I do not think so. She has not even shown that the blow was struck in protection of her furniture. Despite the fact that respondent is a woman and presumably the weaker of the two there is nothing to prove that she had reasonable grounds to anticipate anything worse to happen to her than what occurred at the hands of appellant who was no stranger to her. It would be a dangerous principle to lay down that in an ordinary rough brawl one of the parties, even though weaker, would be entitled to use a formidable weapon which might very easily cause a fatal injury (as could probably have occurred in this instance). It has been proved that appellant as a result of the blow he received, had to go to hospital for treatment for some time.

On the subject of the counterclaim by respondent for damage to her furniture, which term may be taken to include the articles enumerated later, I do not see how under paragraph 5 of the grounds of appeal it can be said that respondent should have called Maduna to prove that appellant had, as she alleges, damaged the furniture. She has stated in her evidence that Maduna left the room before the principal events occurred, therefore, according to her version, Maduna's evidence would have been merely negative. Witness Dora, the reputed wife or mistress of appellant, states that someone was breaking the furniture, but she does not say who? She does not allege Maduna or respondent were doing so? Would respondent smash up her own property? Appellant has stated that there was no stove (which can be taken to be a brazier or fire bucket) in the room of Janet as she asserts was the case and latter is supported by an independent witness, the superintendent of the location.

Harries, Member of Court. I concur.

1929. *August* 6. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Claim for lobolo.—*Essentials of a native marriage under section* 148 *of Law* 19, 1891 (*N.*).—*Appeal from chief.*—Res judicata. —*Right of attorneys to appeal in* lobolo *claims.*—*Act* 7, 1910 (*N.*).—*Jurisdiction of Native Appeal Court.*

FACTS: An appeal from the Native Commissioner's Court, New Hanover.

HELD: That although some of the formalities usually associated with a native marriage were not observed in the present case, there was sufficient evidence on record to establish that the requirements of sec. 148 of the Code had been complied with, and the Court refused to disturb the Native Commissioner's finding on the facts that there had been a legal marriage.

Where, through a misunderstanding with the clerk, the summons had not disclosed that the case was really one of appeal from the chief's judgment and not one of first instance, and where, on making this discovery, the Native Commissioner had thereafter dealt with the matter as an appeal—

HELD: That as the parties had in no way been prejudiced, the Native Commissioner's action in treating the case as an appeal was in order. Courts of native chiefs are not courts of record and by necessity appeals from their judgments cannot be dealt with otherwise than as cases of first instance as provided by the rules. In this instance the Chief's representative gave evidence at the trial, and the summons was issued within the time prescribed for taking an appeal from a chief's judgment to the court of the Native Commissioner.

HELD, further: That under the circumstances disclosed the plea of *res judicata* did not apply.

Act 7, 1910 (N.) requires that *lobolo* claims shall, in the first instance, be tried by the Chief and only be heard by the magistrate in the form of an appeal, and that his judgment shall be final. It also debars the appearance of advocates, attorneys and agents.

QUAERE: Whether so much of this Act as is incompatible with or repugnant to the provisions of Act 38, 1927, had been impliedly repealed, and that advocates and attorneys are entitled to appear; that the judgment of the magistrate can no longer be regarded as final, and that the jurisdiction of this court is in any way restricted by Act 7, 1910 (N.)?

After argument the appeal is dismissed with costs.

For Appellant: Mr. *Fowle*; for Respondent: Mr. *Hands*.

Stubbs, P., delivered the following judgment of the Court: This is an appeal from the judgment of the Native Commissioner, New Hanover.

Before him respondent sued appellant for nine head of cattle said to be due as *lobolo* on his sister Nonkantolo who is alleged to have married appellant's uncle, the late Meitwa. Appellant was sued in his capacity as general heir to Meitwa's estate.

The Native Commissioner awarded a judgment in respondent's favour for the cattle claimed or their equivalent cash value £40 10s. and costs.

The summons claimed nine head, but during the course of the trial the Native Commissioner understood from respondent that the claim was really for eight head, and amended the summons accordingly. When, however, respondent proceeded to enumerate in detail the cattle he sought to recover, it was found that he really claimed nine head, and that it was purely a mistake in calculation. Instead of correcting the error, the Native Commissioner allowed his amendment to stand, but awarded the amount in full when he finally gave judgment.

It also transpired during the trial that the matter was not one of first instance at all, it already having been decided by Chief Madoda, and that the latter had refused respondent's claim on the grounds that no marriage had been contracted by the man Meitwa with Nonkantolo. To save unnecessary expense, the Native Commissioner adopted the expedient of treating the matter as an appeal from the chief.

The copy of the register in which the judgments of Native chiefs are recorded, and which has been put in as exhibit A. of the record, shows that the chief tried the case on the 16th January last; that judgment was registered at the Commissioner's office the next day, and that respondent issued summons five days later, viz., on the 22nd January. Respondent was therefore well within the period of fourteen days allowed under paragraph 5 of the rules regulating appeals from Native chiefs to the courts of Native Commissioners, and published under Government Notice No. 2255 of 21/12/28. The rule reads as follows:—

"5. Any party desiring to appeal against any judgment or order of the chief's court shall notify such chief or his

representative of his intention and lodge his appeal in person with the native commissioner within (14) days from the date of the pronouncement of the chief's judgment or order."

The Commissioner states that respondent is a dull witted man, and that the omission to refer to the matter as an appeal was due to his not being understood by the clerk when preparing the summons.

Neither party was represented by counsel at the trial before the Commissioner. The chief's headman was present and gave evidence on behalf of the chief.

One of the grounds of appeal is that the claim before the Native Commissioner was *res judicata* as the matter had already been before the chief and decided.

The jurisdiction of this court has been fixed by sec. 15 of Act 38, 1927, and is as follows:—

"15. A Native appeal court shall have full power to review, set aside, amend or correct any order, judgment or proceeding of a Native Commissioner's court within the area of its jurisdiction, or to direct a case from such a court to be retried or reheard or to make any such order upon the case as the interests of justice may require: Provided that no judgment or proceeding shall, by reason of any irregularity or defect in the record or proceedings, be reversed or set aside unless it appears to the court of appeal that substantial prejudice has resulted therefrom."

It will be seen from this section that although it was the intention to clothe this court with wide discretionary powers when dealing with appeals, its powers were nevertheless to be restricted and were not to be applied in setting aside judgments on merely technical grounds where no substantial prejudice had resulted from the irregularity.

Appellant's counsel has advanced the contention that as soon as the Native Commissioner discovered the real nature of the action it was incumbent upon him to have dismissed the summons, the general effect of which would have been to debar respondent of any further remedy because of the time limit fixed by our rules, and incidentally to have precluded consideration of the present appeal because there the matter would have ended.

Even to-day any exception, which might be considered a reasonable ground for remitting the case for trial *de novo*, would be met

by the same difficulty. Further proceedings would be effectually barred, and respondent would be left remediless however good a claim he might have.

We have therefore to determine whether the action of the Native Commissioner was prejudicial. In our view it was not. The irregularities complained of appear to us to be precisely those which were intended to be covered by the proviso to sec. 15 of the Act.

Courts of Native chiefs are not courts of record, and by necessity all cases tried in such courts must be tried *de novo* and treated as cases of the first instance, *vide* paragraph 8 of the rules of Chief's Civil Courts.

Rule 5 (*supra*) provides that the dissatisfied party shall notify his chief or his representative of his intention to appeal, but there is nothing on the record to show that this was actually done, but it seems safe to assume that this requirement was complied with because the chief's representative was present at the trial and gave evidence on his behalf. After all the object of the rule was to ensure the chief or his representative being present at the hearing of the appeal to give his views and reasons for judgment.

Rule 5 unless considerably modified is going to operate most unfairly for, speaking tentatively, neither this court nor the courts of Native Commissioners have power to extend the time limit fixed by it. To us the operation of this rule seems to be in entire conflict with the objects of sec. 15 of the Act, to which reference has already been made, and is in striking contrast to the provisions that existed under the Native High Court Act of 1898 (N), and the rules framed thereunder. Under that Act every facility was given to enable appeals being instituted against chief's judgments, and that Court had very wide powers, but we have no voice whatever in matters dealt with by chiefs. Our jurisdiction begins only after the matter has been dealt with by a Native Commissioner. This is most undesirable, and should be rectified at an early date. Rule 5 might be amended to enable Native Commissioners to extend the time limit upon good cause shown.

We are unanimously of opinion that the Native Commissioner was in order in treating the matter as an appeal although the summons contained no reference to it, and that the plea of *res judicata* does not apply.

Before proceeding with the second ground of appeal, there are other aspects in this case calling for comment although not raised

by either party because of their particular importance in future litigation of this nature.

Prior to the promulgation of Law 19, 1891, otherwise known as the Natal Native Code, there was no bar to *lobolo* claims, but by sec. 182 of that enactment all such claims were barred in our courts of law, and it was not until Act 7, 1910 (N.) was passed that this barrier was removed.

This Act was passed as the result of restrictions imposed in consequence of East Coast fever, and although it contained certain reservations, more particularly in regard to procedure, the general effect was to restore the position as it existed prior to the promulgation of Law 19, 1891—*Rubeni* v. *Gwatsha* (1919, N.H.C. 19).

This Act lays down that all *lobolo* claims must, in the first instance, be instituted before the chief, and that an appeal lies from his decision to the magistrate but no further. It also bars the appearance of advocates, attorneys and agents in such cases.

As already pointed out, sec. 15 of Act 38, 1927, gives this court very wide powers of review over the courts of Native Commissioners which by sec. 10 (c) take the place of magistrate's courts in civil causes and matters between Native and Native whilst sec. 16 of the same Act confers a right on advocates and attorneys (and agents in some cases) to appear in Native cases. Sec. 11 (1) also gives recognition to *lobolo* claims throughout the Union without reservation or restriction.

These provisions are in direct conflict with Act 7, 1910 (N.).

As this is not a ground of appeal, we are not called upon at this juncture to do more than direct attention to the anomaly of the position in this regard. Without binding ourselves on the point, it would seem probable that the intention was that so much of the provisions of Act 7 of 1910 (N.) as are repugnant to or inconsistent with the provisions of Act 38, 1927, have been impliedly repealed by the latter Act. This view is suggested by the provisions of sec. 36 of the Act, implemented by Government Notice No. 296 of 1928, which reads:—

> "The laws mentioned in the Schedule to this Act, and so much of any law as may be repugnant to or inconsistent with the provisions of this Act, are hereby repealed."

The second ground of appeal alleges that there was no proof of a legal marriage.

Sec. 148 of the Code lays down the following three essentials to a Native marriage or customary union as it is now termed:—

(*a*) The consent of the father or guardian of the intended wife. Such consent may not be withheld unreasonably.

(*b*) The consent of the father or kraal head of the intended husband, should such be legally necessary.

(*c*) The declaration in public by the intended wife to the Official Witness on the marriage day, that the proposed marriage is with her own free will and consent.

Secs. 149 and 150 prescribe the procedure to be followed by the contracting parties and by the Official Witness; and sec. 151 provides for the registration of the marriage within thirty days of its celebration, but none of these provisions are essentials. As the Native Commissioner states, registration is merely an ancillary act.

The court below has found as a fact that there was a legal marriage notwithstanding the fact that the ceremony was purely formal and was not attended by the usual ceremonies associated with a Native wedding.

Respondent, the woman herself, and several other witnesses declare that the requirements of sec. 148 of the Code were observed. The Official Witness states that there was no marriage. Probably the word he used was "wedding" because technically there is no exact equivalent in Zulu for the term marriage as used by us in its strictly legal sense. He admits that the consent of the woman's father had been obtained; that the woman herself and the intended husband consented; that there was a small gathering at the kraal of the bridegroom's father where a little beer was drunk; that they then repaired to the kraal of the bridegroom and had more beer; that he received the marriage fee of 10s. which later he handed to the chief, and that he directed the husband to be at the office of the Native Commissioner the following Thursday in order to effect registration.

Yet in the same voice he declares that there was no marriage. At this gathering the question of *lobolo* cattle was also gone into and arranged.

Mr. *Fowle* has argued that the evidence on the question of consent is inconclusive, but one might well ask that if there was no marriage what necessity was there for arranging for its registration as alleged by the Official Witness. It is well to bear in mind that this witness gave evidence to support the chief. It only seems

reasonable to infer that both the Official Witness and the chief regarded the omission to register the marriage within the time prescribed by sec. 151 of the Code rendered them liable to the penalties prescribed for such an omission, and to protect themselves found it convenient to declare that no marriage was celebrated. At any rate this is the impression created in our minds.

The guardian (respondent) has not stated in so many words that he gave his consent. He does not appear to have been questioned on the point, but his conduct in suing for the *lobolo* and declaring that his sister was lawfully married certainly goes to confirm the statements of the other witnesses that his consent had been obtained.

The absence of the usual ceremonies is attributed to the illness of the husband; the absence of the woman's brother, and to poor crops. The woman had also had a child by some other man. The husband died some seven months after these happenings occurred.

It is significant that the woman is still living at the kraal of the late Mcitwa.

On this evidence we are not prepared to differ with the Native Commissioner, and hold with him that there was a legal marriage.

In this connection attention is drawn to the definition of "customary union" as contained in sec. 9 of Act No. 9 of 1929.

On the point raised by Mr. *Fowle* as to the actual number of cattle involved, respondent in his evidence states: "Of the four, which were brought, I killed a young bull, and I sold a cow. Then Clemmens brought two cows. Then the *Mfunananelwa* cow had a calf, but Mcitwa did not count that as *lobolo*. The *Mfunananelwa* had a second calf and so did two of the other cows, making eight beasts in all, and these are the eight beasts which defendant took away from the dip."

Worked out, we get the following result: Four head which were brought originally (it is immaterial how he disposed of these) plus two which were subsequently brought by Clemmens, plus the second calf of the *Mfunananelwa* cow, plus two, the increase of "two of the other cows" as respondent puts it, making a total of nine, and not eight head as computed by him. This is amply corroborated by the evidence of Citamasi. There is no evidence of value to refute this, and this being so the lower court was correct in awarding him a judgment for nine head.

We are therefore not prepared to interfere with this award. This was the number involved in the original issue before the chief and

was the number claimed by respondent himself before the Native Commissioner.

This case well illustrates the care needed in attending to Native cases, and the serious injustice that may result through mistakes for which a party may be in no way to blame.

The appeal is dismissed with costs.

TONYA MABASO v. GWAZINDHLU ZULU.

1929. *August* 6. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Partnership.—Joint purchase of donkeys for transport purposes. Appeal on questions of fact.—Extravagant claim.

FACTS: An appeal from the Native Commissioner's Court, Durban. Appellant and respondent entered into an arrangement by which each party contributed four donkeys for the purpose of riding transport. After three years appellant demanded an account alleging that his animals had increased to fifteen, and that he was entitled to £50 as his share of their earnings.

Respondent only admitted liability for two donkeys; established that two were attached under a judgment against appellant, that one died, and that the balance of one had one foal only.

The Native Commissioner in awarding appellant a judgment for the two animals admitted, gave costs in favour of respondent.

The Court, on appeal, refused to disturb the judgment on the facts, and as regards the order for costs, regarded the claim as extravagant and fictitious, and considered that the Native Commissioner had rightly exercised his discretion.

After argument the appeal is dismissed with costs.

For Appellant: Mr. *Darby*; for Respondent: Mr. *Hands*.

STUBBS, P.: This is an appeal from the decision of the Native Commissioner, Durban, before whom appellant claimed the delivery of five donkeys and their increase of ten or fifteen in all; also £50 as hire for their use for a period of three years.

The Native Commissioner awarded appellant a judgment for two donkeys, but disallowed the claim for the remainder and the claim for hire, and also awarded costs against appellant.

This judgment is brought in appeal on the main ground that respondent, having admitted that he had received eight donkeys, the *onus* lay upon him of proving the contention, now advanced, that he had paid four of them, and that one had died.

The whole claim is based upon what appears to have been a very loosely arranged contract. Appellant to succeed, must substantiate his claim. He alleged that he bought eight donkeys from one Jacobs, but this witness was not called, yet it is possible that he may have been able to throw some light on the transaction. Several other natives are referred to by him, but none were called to give evidence.

Respondent has given a satisfactory answer to the claim and has brought forward several witnesses to support his story. It is to the effect that four of the donkeys were bought by appellant and four by himself; that two of appellant's animals were attached, and that one died, and that the sole remaining one had a foal making a total of two which he admits are in his possession and belong to appellant. It is admitted that two were attached.

The claim for £50 is based on such flimsy evidence, that appellant's counsel found it necessary during the course of the argument to withdraw it.

The whole issue depends solely on a question of fact, and on the evidence before us we find it impossible to disagree with the finding of the lower court. In my view the respondent did satisfactorily account for all the animals that came into his possession.

I now come to the question of costs. Counsel for appellant contends that as his client was partially successful he should have been awarded costs. There is ample authority to show, however, that unless a magistrate has wrongly exercised his discretion in this regard, courts are slow to interfere.

Appellant has only succeeded to the extent of respondent's admission. A letter of demand was served on respondent before the issue of summons, but this only had reference to hire and contained no reference to the donkeys sought to be recovered. In answer to this respondent denied all liability. It has been suggested that he should, in response to this, have given some explanation, and at least to have made a tender of the animals he admitted having in his possession. Our rules do not provide for the issue of letters of demand, nor is the question of tender touched upon, although there can be no question that a tender of the articles admitted, would have an important bearing on the question of costs.

In this case respondent was summoned to appear—a summons which he had to obey or suffer a default judgment being entered against him, and in pleading to it he admitted his indebtedness in the two animals. He could have hardly been expected to do more. The greater portion of the claim has been abandoned. and I can only regard the one for fifteen donkeys as extravagant and falling within the same category as the claim for £50.

It has not been shown to me that the Native Commissioner acted arbitrarily, or capriciously, or upon wrong principles, and, in the circumstances, I am not prepared to interfere with his order for costs.

According to Mr. *Darby's* own showing, in his evidence defendant (respondent), when he went to interview him after the receipt of the demand, which was for £50, being in respect of the hire of five donkeys, denied liability under the demand as it was then sent (I quote Mr. *Darby's* own words).

The test is, was the conduct of the defendant such, after the receipt of the demand, which was for fifty pounds, and not for donkeys, as to have made it necessary for plaintiff to go to Court in order to recover his donkeys? To decide this point, when technically did plaintiff demand the donkeys? Only after summons.

Defendant having been cited before the Court on the summons, admitted in his plea that he had two donkeys belonging to plaintiff, and on the facts, the court below found in favour of plaintiff (appellant) for these two donkeys, and for nothing else.

Here, then, we have the claim in the first instance for £50 hire of donkeys and no claim for anything else is made. The one for the recovery of the fifteen donkeys is developed only in the summons, which strongly suggests that appellant was not at all sure of his claim and promptly set out to explore the possibilities of founding a better claim which culminated in the additional claim for the donkeys.

If there were any doubt as to the correctness of this inference it is removed by the action of Mr. *Darby* himself in abandoning the ground of appeal in respect of the £50 for hire. This is tantamount to an admission that this claim was wrongly founded and fictitious; and if he elected to bring it into Court in that form he did so at his own peril.

The proceedings contain a reference to the custom of *sisa* or agistment of stock, but there is nothing to show that the custom was resorted to in this instance.

The appeal is dismissed with Costs.

Ahrens, Member of Court: I concur.

Lugg, Member of Court: This is an appeal against the judgment of the Additional Native Commissioner, Durban, in which Court the plaintiff claimed the delivery of certain five donkeys and their increase 15 donkeys, and also payment for their use over a period of more than three years, which plaintiff values at £50.

The Native Commissioner gave judgment in favour of plaintiff for two donkeys and as far as the claim for hire is concerned, judgment was given for the defendant with costs of suit. The plaintiff now appeals against the judgment of the Native Commissioner on the grounds as fully set forth in his notice of appeal.

The plaintiff, in order to succeed, must prove his case. As far as the purchase of the donkeys is concerned, which donkeys as averred by plaintiff were to be worked on half shares, he relies on a contract which in any case is loose in the extreme. He alleges having bought eight donkeys from one Jacob, but for some reason or other Jacob was not called, as he, no doubt, could have thrown a little light on the matter. He states that there were several witnesses present, for instance Jubela, Mtili and Mandhla Sambane, but none of these were called by him in order to substantiate his claim. The defendant gives a good reply and brings witnesses to support his version, which is to the effect that he purchased four donkeys for himself and four were purchased by the plaintiff, two of the plaintiff's were attached and one died. The plaintiff does not deny that two of his donkeys were attached and that one died. This leaves a balance of one, which according to the defendant had a foal. The defendant, in his plea admits having these two donkeys in his possession and in view of the fact that the plaintiff failed to prove his case which is for 15 donkeys, we concur in the judgment of the Native Commissioner.

Now we come to the other claim, which is one for payment of £50 for the use of the alleged 15 donkeys of plaintiff's over a period of more than three years. The plaintiff in the court below gives us no idea whatsoever how this claim is arrived at. He merely relies on a bald statement in his evidence where he says "I claim money for my donkeys." Does he now expect this Court to imagine the rest?

Apart from the fact that this Court has already found against the plaintiff in his claim for the delivery of 15 donkeys, there is

no evidence produced by plaintiff to enable him to succeed in his claim for hire, as has already been pointed out. On this point we agree with the judgment of the Native Commissioner.

In his evidence in the court below, Mr. Roderick Ivan Darby, a partner of the firm Bisset and Darby states that the demand sent to the defendant was for hire and that he denied liability under the demand as it was then sent.

The defendant in his plea however admits having two donkeys belonging to plaintiff. The plaintiff not having succeeded in his claim, beyond the two donkeys which the defendant admitted, is, in the opinion of this Court, not entitled to costs and here again we agree with the judgment of the Native Commissioner.

I agree the appeal should be dismissed with costs.

HONTJI MNCUBE v. SAMUEL KUMALO.

1929. *August* 7. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Agency.—Sale of Oxen.—Negligence.—Damages.—Appeal on questions of fact.

FACTS: An appeal from the Native Commissioner's Court, Vryheid. Where respondent had handed two oxen to appellant to sell in the form of butcher's meat and the evidence disclosed that the latter had failed to account for the whole of the proceeds.

HELD: That the Court would not disturb the judgment of the Native Commissioner in which he had awarded respondent £8 and costs, and dismissed the appeal with costs in favour of respondent.

For Appellant: Mr. *Darby;* for Respondent: Mr. *D. G. Shepstone.*

STUBBS, P.: Action was brought in the Court of the Native Commissioner at Vryheid by the plaintiff (respondent) against defendant (appellant) for the recovery of the balance of £8 on the sale of two oxen alleged to have been disposed of by appellant at the request of respondent.

It would appear from the facts that respondent arranged with appellant to dispose of the flesh of certain two oxen belonging to the former which he valued at from £9 to £10 each.

The oxen were of the bastard Boer type, weighing between 600 and 700 lbs. They were delivered to appellant by respondent at the farm of Hans Geldenhuis. One was slaughtered and the flesh sold through one Sibiya to Natives at the Hlobane Compound and the other was disposed of by appellant to one Philip Zwane. Certain moneys realised on the sale of the meat of the one ox and the sale of the other were from time to time paid by appellant to respondent but there is conflict in the evidence of appellant and respondent as to the actual amount. Respondent states all he received from appellant as the proceeds of sale is £8. Appellant states he paid £9 to respondent which represented all he recovered on the sale of the two oxen.

It is common cause that appellant was entrusted with and undertook the sale of the flesh of the two oxen and it was respondent's intention and appellant's expectation that his services in connection therewith would be suitably rewarded.

In virtue of this agreement between the parties it became the duty of appellant in the carrying out thereof to exercise reasonable care and foresight to insure as far as possible that the transaction would be to the benefit of respondent.

Without travelling over the whole ground of the evidence in detail, I think appellant's own admission in cross-examination that he expected to realise £8 for the one beast and that Sibiya to whom he had entrusted the sale of the meat had, to use his own language, " Made a hopeless mess of the business " and that he thought Sibiya had only realised £4 for the meat, conclusively shows that in regard to the first beast, he failed to discharge the obligation which rested upon him. He was in the nature of his undertaking bound to give a proper account to respondent of all moneys derived from the sale of its flesh. He has failed to do so. If he employed for its sale a person in whose integrity he had little faith, as admitted in his own evidence, he did so with his eyes open at his own risk, and he cannot now take shelter behind Sibiya's misdoings and disclaim responsibility. There can be no doubt, from his own admission, Elijah's Mhlopo's evidence that "the bullocks were very big," Hans Jacob Geldenhuis' evidence that they weighed " from 600 to 700 lbs. and their value was about £9 or £10," corroborated by Jacobus Petrus Geldenhuis,

the oxen in question were of the value placed upon them by respondent.

The evidence as to the price realised on the sale of the second beast is conflicting. Respondent in his evidence states appellant subsequently informed him he had sold the ox to another Native for £6 10s. Mhlopo states: "Defendant (appellant) told us a man wanted to buy the second beast for £6 10s." Simon Masondo, called for appellant, states: "On the day of the sale plaintiff (respondent) was not there." Appellant states, and he is corroborated by Philip Zwane and Mtetwa, "Plaintiff (respondent) was at my kraal . . . . . I told him Philip Zwane wanted a beast. Plaintiff said I could sell it for £6 I told him Zwane wanted an ox for £5. Plaintiff then said I could sell it for £5. Plaintiff was present when Zwane and defendant transacted the purchase and sale of the ox but took no part in the discussion." If appellant's evidence is to be believed it would mean that respondent acquiesced in the sale of the ox to Philip Zwane for £5 and he cannot now be heard to say that because the beast was a large one and from the outset was of more value than £5 he is entitled to the value placed upon it at the time he handed it to appellant to dispose of. In any case, even if, as seems the case, the lower court believed his evidence, he could not expect to succeed in a larger sum than £6 10s. for this beast in face of his admission and corroboration on the point, that he offered no demur when told by appellant he had sold it for £6 10s. His conduct, I think, must be taken to have amounted to acquiescence in the sale by appellant of the beast for £6 10s. If the evidence of respondent and his witnesses is accepted in preference to that of appellant and his witnesses, as I think it should be, we arrive at the position that appellant was obliged to account to respondent for the sum of £10 in respect of the first beast and £6 10s. for the second beast. The Native Commissioner believed the evidence of respondent that £8 in all and not £9 was paid by appellant to respondent leaving the balance of £8 unpaid.

It is difficult to understand how the court below arrived at the amount of £8 in giving judgment for respondent for that amount, unless it be that respondent's evidence was accepted that appellant had said he had received £8 for the first ox and 15s. for the skin of the same ox and £1 5s. for the inside parts making £10. This evidence is corroborated by Mhlopa but denied by appellant who says he realised only £4 and Sibiya, who disposed of the meat, and

others say the same. It would seem that the Native Commissioner accepted respondent's evidence on the point and rejected that of appellant. This is borne out in the facts found proved in his reasons for judgment in which he says, "The defendant (appellant) reported to the plaintiff (respondent) that the meat, etc., of the one ox had realised £10 and that he had sold the second beast alive for £6 10s." But even so, the judgment should have been for £8 10s. and not for £8. However that may be, on the evidence as it stands, the Native Commissioner had the witnesses before him and he would be in a better position than this Court to decide on their credibility. I am not prepared to say he was wrong in that decision.

The *onus* was upon respondent to prove three things: 1. The agreement with appellant. 2. Delivery of the oxen. 3. Their value. He has done so. Appellant's defence is that he has paid over to respondent money recovered by him upon the sale of the meat of the one beast and the price obtained for the second beast. The *onus* was upon him to prove that he had properly accounted for and paid to respondent all money accruing from the sale; alternatively that any loss sustained by respondent as the result of the transaction was not due to his negligence or want of proper care and diligence.

He has failed to do so.

The appeal must therefore fail with costs in favour of respondent.

Ahrens, Member of the Court: I concur.

Lugg, Member of the Court: The evidence in this case has been subjected to very close criticism by counsel on both sides, and as the grounds of appeal are based purely on questions of fact, we are required to determine whether the Native Commissioner was correct in the conclusions he came to on the evidence.

Unfortunately we get little assistance from the judgment as it is extremely vague and cryptic, and yet this happens to be one of those cases where the observations of the Commissioner on the evidence on which he based his judgment would have been most helpful to this Court. Substantially, however, the issues are fairly clear and enable us to arrive at a definite decision.

Mr. *Darby* states that the evidence regarding the value of the two oxen is so strong that he is bound to accept it, but his contention is that this value is of no particular bearing on the case; that in fact it is irrelevant unless the plaintiff can prove what was

realised on the animals by the defendant. No value was fixed by the parties as a selling basis for the meat; it was simply a speculative enterprise depending in its success on the demands from the local Native compound, and according to his view a reasonable explanation has been given by defendant of the amounts realised on the sales, and that these were duly accounted for to plaintiff.

He points out further that no claim for damages was made, nor has negligence been proved. Defendant acted in good faith and the losses suffered were nothing more than might be expected in a transaction of this nature.

On the other hand Mr. *Shepstone* emphasises that it was common cause that the animals were received by defendant and that he was to sell them to the best advantage as plaintiff's agent, receiving the skins as a reward. It must also have been a matter of common knowledge that the animals were worth £8 or £9 apiece otherwise how was it possible for the defendant to know the basis on which he was to do business. A reasonable profit was expected from the transaction, but from what can be gathered from defendant, all he realised was £9 of which plaintiff only acknowledges having received £8.

Mr. *Shepstone* has gone to considerable trouble to show the several contradictory and inconsistent statements which occur in the evidence of the defence, and he has also stressed the point, when dealing with the question of negligence, that according to defendant's own admission he appointed Sibiya as his sub-agent unknown to plaintiff "who made a mess of the whole business."

Plaintiff tells us that defendant admitted to him that he had realised £10 on the one ox and £6 10s. on the other, but had only accounted for £8 leaving a balance of £8 10s. Defendant denies having made such an admission.

Which evidence is to be accepted? This is the simple issue.

The learned President has effectually dealt with the unsatisfactory nature of the defendant's evidence, and it is unnecessary for me to cover the same ground again. All I can say is that I fully concur with the observations he has made. To my mind the conduct of defendant savours of fraud, and I have no hesitation in holding that the appeal should be dismissed with costs.

1929. *August* 7. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Inheritance and succession.—Allegations of illegitimacy.—Foundling significance of Native names.—Credibility of evidence.

FACTS: An appeal from the Native Commissioner's Court, Port Shepstone. Respondent's claim to succeed to the Estate of his grandfather, through his father was disputed on the grounds that his father was not a son of his grandfather, but a foundling.

HELD: That the Court would not disturb the judgment of the Native Commissioner in which he held that respondent had established his linial descent from his grandfather through his father and his right to the Estate.

After argument the appeal is dismissed with costs.

For Appellant: Mr. *Clark*, instructed by Mr. I. B. Cawood; for Respondent: Mr. *Gibbs*, in default.

STUBBS, P.: The appeal in this action is brought on the four following grounds:—

(i) The Native Commissioner wrongly held that Sikotshmana is the son of Mrabula. No direct evidence of Mrabula's alleged marriage with Masibiya or of the parentage of Sikotshmana was brought forward, the evidence of Chief Jemusi being purely hearsay.

(ii) The evidence for the defence clearly establishes that Mrabula only had three wives, that Sikotshmana was a foundling and that the defendant is a son of Mrabula.

(iii) The attitude adopted by Ngaqana for the reasons stated by him, and who has resided in Pondoland for many years, should not prejudice the rights of the defendant, who is still a minor in law.

(iv) The judgment is against the weight of evidence.

The facts are set out in the Native Commissioner's reasons for judgment and do not require detailed reiteration. The respondent claimed in the court below, certain five head of cattle, representing the *lobolo* of one Gadeleni, the daughter of Mrabula, which respondent avers were wrongfully and unlawfully received by the appellant.

Respondent bases his claim to these cattle on the ground that he is heir to the Estate of the late Mrabula, his grandfather.

The lower court decided in favour of respondent's claim with costs.

The defence set up in the Native Commissioner's Court is that Sikotshmana, the father of respondent was not the son of Mrabula, but a foundling, and in the absence of Mgodoyi, who has disappeared, appellant is the heir.

As against this respondent contends that the appellant is the illegitimate son of Nomaswana alias Matshozi by one Mgidelambile born after the demise of her husband Mrabula.

In coming to a decision on the facts, the Native Commissioner relied largely on the testimony of the Chief Jemuse, who was in a position to give evidence based on first-hand knowledge, strengthened by the probabilities in the other evidence and the circumstances as a whole.

The appellant's admission that he had been told by Radebe that Sikotshmana was a son of Mrabula, even though disputed by his people, seems to leave little or no room for doubt that Sikotshmana was always regarded and treated as the chief son of Mrabula's house. This is fortified by some of the witnesses for the defence. It was common knowledge that Sikotshmana gave in marriage the elder sisters of the appellant and the daughters of the house of Manyoloza, where there was no heir. Ngaqana, appellant's guardian, stood by and allowed this to take place without demur. Can he now be heard to support appellant's claim? I think not.

It seems extremely unlikely that as guardian of appellant he would allow Sikotshmana to step in and assume control of the affairs of Mrabula, then deceased, and receive all the *lobolo* for the daughters if, at the time, he believed appellant was the heir to the estate. His excuse for staying his hand "that he awaited the return of Mgodoyi" does not carry conviction and he can offer no explanation of appellant's failure to oppose Sikotshmana's consumption of his inheritance. His attitude at the time clearly implied acquiescence in Sikotshmana's title.

Turning now to the question of the alleged illegitimacy of the appellant, the Chief Jemuse gives his evidence clearly and impresses me, as he no doubt did the Native Commissioner, with the ring of truth in all that he says. The circumstances in which, some sixty years ago, Mrabula joined his father's tribe, and the subsequent events leading up to the birth of the appellant, are told simply and clearly and in their proper sequence.

In continuing his narrative of the Mrabula family history he says: "Two years elapsed after Mrabula's death during which time his widows had not remarried and had continued to live in the old kraal. Then Mgududu and Matshozi both became pregnant illegitimately and this fact was reported to me by Sikotshmana. I had been many years chief of our tribe. The persons responsible for the pregnancy were not known and I told Sikotshmana that his luck was in and that his inheritance would be increased by the advent of two more children. Sikotshmana told me that all he could gather from the women conceived was that they had become pregnant at beer drinks. Thereafter Mgududu bore a girl whom Sikotshmana named Nomajiki, and Matshozi bore a boy who was named Dingimphala (i.e., the defendant). When Mrabula first came to this country he told us his history and related that his dead wife was Masibiya, who was the mother of Sikotshmana."

And although subjected to a searching cross-examination by Mr. *Cawood* for appellant, he was unshaken on the main facts. There is on this point also the corroborative evidence of Salamu who states under cross-examination: "I remember the period of two years that intervened between Mrabula's death and the birth of the defendant and Gadeleni, because it was a scandal and much commented on at the time. It was known that since Mrabulo had no brothers to "Ngena" the women the children must necessarily be illegitimate."

I see no reason why these two witnesses should deliberately misrepresent the facts. Admittedly there are elements of hearsay in Jemuse's evidence, as argued in the first ground of appeal, but hardly sufficient to vitiate the main points which, taken in conjunction with the probabilities and all the other facts, establish, in my opinion, the case for respondent in the court below.

The names of appellant (Dingimphala) and his sister (Nomajiki) may or may not be significant. The Native Commissioner in the court below, while admitting they were not conclusive proof of illegitimacy, considered their meaning significant and in conjunction with the recited facts, assisted him to come to the conclusion that appellant is illegitimate, and on the facts I see no reason to differ from his conclusions on any of the grounds.

The appeal is therefore dismissed wtih costs.

Lugg, Member of Court: The learned President has dealt exhaustively with the evidence in this case, but I would also like to make one or two observations.

The main question for decision is whether respondent's father, the late Sikotshmana, was the legitimate son of Mrabula, or merely a foundling as alleged by appellant.

The story advanced by respondent and his witnesses is that he is the son of Mrabula; that Mrabula contracted a marriage in the early days in Zululand with a woman named Masibiya by whom he had Sikotshmana and a daughter named Nozingobo. The latter died in infancy.

On the other hand it is asserted by appellant that there was no such marriage, and that Sikotshmana was a foundling picked up by Mrabula on one of his hunting trips in Zululand. In this he is supported by the evidence of an old man named Gonoti Mtetwa and Manyoloza, the sole surviving widow of the late Mrabula.

The principal witnesses for respondent are the old Chief Jemusi Qwabe and a contemporary named Salamu. Both are very old men, and are some of the few now living who can give first-hand information on the matter, for it must be borne in mind that the events to which the evidence related took place some sixty years ago. Jemusi is about eighty years of age. He tells us that at that time he and his father lived at Inanda, and that it was whilst living there that Mrabula joined them from Zululand and became a member of their tribe. At the time he was accompanied by Sikotshmana whom Mrabula described as his son by a deceased wife named Masibiya. Both Jemusi and Salamu aver that this was generally accepted and common knowledge, and both emphatically deny that there was any suggestion that Sikotshmana was a foundling.

Chief Jemusi has been living in close contact with the family and should be in a better position to know its history than any other person. As chief of the tribe he would be the repository for the more valued information concerning the various families of the tribe. He is referred to as a man of very clear memory and reliable, and this is the reason why the Native Commissioner has attached such importance to his evidence.

On the other hand the old man Gonoti Mtetwa states that he accompanied Mrabula on several of his hunting trips to Zululand, and that at that time Mrabula was a batchelor. Then they parted and did not meet again until Jemusi's tribe had migrated to the Port Shepstone District. By then Mrabula had three wives, and it was only then that he made the acquaintance of Sikotshmana. He did not know Sikotshmana's father or mother, but was informed

by Mrabula that he had rescued Sikotshmana during the disturbances which occurred in Zululand about 1884. He denies that Sikotshmana was a son of Mrabula, but his evidence contains a statement to the effect that on one occasion Mrabula told him that one of his wives had died, but he was unable to say whether this had reference to one of the three wives. The evidence on this particular point is somewhat vague, and might have been submitted to a little more investigation. It is significant in that it seems strange that this witness should not have been more positive on the point seeing that he was a resident of the same district.

The whole of the appeal rests entirely upon question of fact. The Native Commissioner has accepted respondent's version, particularly the evidence of Chief Jemusi. It has not been shown or suggested that this witness had any particular reason for giving the evidence he did, and I can see no reason for differing with him; and unless it can be shown that he drew wrong conclusions from the evidence or came to a wrong decision, we cannot interfere.

Respondent instituted the action in the court below, and he declares that his father was the son of Mrabula. We must presume that he was. The *onus* therefore lies on appellant to prove otherwise, and in this he has failed.

Had it been established that Sikotshmana was not a member of Mrabula's family, appellant would have succeeded as a matter of course, but even his position is assailed. It is asserted by Respondent that he was born some time after the death of Mrabula and is the result of illicit intercourse by his mother with one Mgidelambile, and that appellant received the name of Dingimpahla (To be in want of property) as the result.

Having given a decision on the main issue we are not called upon to decide at this stage whether Dingimpahla was legitimate or not, but I find it necessary to make one or two comments on this aspect of the case because it has a bearing on the credibility of appellant's witnesses.

The Native Commissioner has attached considerable significance to the meaning of the word, and so do I. In coining names for their children Natives generally select one which has some bearing on an event or incident associated with the birth. I think one can safely infer that the reason why Dingimpahla received this name was because of his illegitimate birth, and that the want of property or an inheritance would be the natural consequence. If it was merely a coincidence then it was unfortunate for it is cer-

tainly one of those elements in the case which tends to strengthen the case of respondent and to weaken his own.

It is admitted that Sikotshmana appropriated some of the property belonging to Mrabula's estate and that appellant stood by and made no protest. Appellant's excuse is that he was waiting for his elder brother Mgodoyi to take action, but according to his own showing Mgodoyi died before the Anglo-Boer War.

Mr. *Clark* has argued that before the question of Sikotshmana's legitimacy can be settled proof of Mrabula's marriage to the women Masibiya should be forthcoming. This, of course, is quite impossible. The marriage would have taken place in Zululand long before British occupation, and as far as can be ascertained no one is now living who could give direct evidence on the point. On the other hand appellant has not proved the absence of such a marriage, and as he has challenged the position the *onus* is upon him to do so.

The appeal should be dismissed with costs.

Ahrens, Member of Court: In the Court of the Native Commissioner, Port Shepstone, the plaintiff as alleged heir to the Estate of the late Mrabula claimed from the defendant certain five head of cattle, the *lobolo* of a girl named Gadelini, daughter of the late Mrabula, which cattle, plaintiff avers, have been illegally received by the defendant. The Native Commissioner found for plaintiff with costs, against which award, the defendant now appeals on the grounds which have been quoted in *extenso* by the learned President.

For some reason or other counsel for the respondent did not appear, and his action by ignoring this Court is deprecated and he should be called upon through the Registrar to offer explanation.

The crux of the whole matter is whether Sikotshmana is the son of Mrabula or not. It is not denied that Mrabula had taken three wives since he came to Natal, the first of whom was Madhlodlongo who bore Mgodoyi, who is said to have disappeared. It is not known whether he is dead or still alive. The defendant is the son of Matshozi the third wife of Mrabula taken since his advent to Natal. Plaintiff's witnesses allege that he is illegitimate.

The defence claim that Sikotshmana is a mere foundling. The evidence of Chief Jemusi is of great importance. He states that Mrabula came from Tongaland during his father's lifetime and became a member of his father's tribe. He brought with him

Sikotshmana, father of plaintiff, who was then a boy. He told them that his wife Ma Sibiya had died in Tongaland, and that Sikotshmana was his son and heir. He goes on to say that it was common talk and common knowledge. Salamu bears him out in this respect. It is true that in some respects this is hearsay, but as far as natives are concerned ancient history must necessarily be largely hearsay. The fact must not be lost sight of that it is custom, broadly speaking, before a chief allows a strange Native to become a member of his tribe, searching enquiries are made as to his antecedents and *bona fides* in order to protect his own safety, and that of the society of his people, and, no doubt due enquiries were made on these lines with the result that Mrabula some time or other related his family history.

There are probabilities and surrounding circumstances which strengthen the evidence of the chief, viz., the evidence, including that of the defence, goes to show that Sikotshmana has always been treated as the chief son of his father's house. Plaintiff married off the elder sisters of the defendant and the daughters of the house of Manyoloza, notwithstanding the existence of Ngaqana the younger brother of Mgodoyi.

Even the defendant admits that it was common talk that Sikotshmana was the son of Mrabula, but, he says, his own people deny this. This, to my mind, suggests some conspiracy against the plaintiff by some or other of the members of the family for the purposes of this case.

Ndebe the last witness for the defence springs the surprise upon us of four foundlings which Mrabula is supposed to have had. Mrabula must have been trading in foundlings. It is strange that no other witness had thought of the other three foundlings. There is here a confounding of foundlings which, to say the least, is confusing. The evidence of the defence does not impress me very much.

In view of the above, there seems to be no reason to disturb the judgment of the Native Commissioner where he held that the plaintiff's status as general heir of the late Mrabula (through Sikotshmana) had been proved. This being so, it is not necessary to go into the question of the illegitimacy of the defendant or otherwise.

In the summons the plaintiff claims five head of cattle, whereas in his evidence he makes mention of six, the original four having

been increased to six. There is nothing to show what has become of the sixth. However, since he claims five head only, it is assumed that he has abandoned his claim in regard to the 6th.

In the circumstances I entirely concur in the judgment of the learned President.

BOSIKI MAKOBA v. NKANYA MAKOBA.

1929. *August* 8. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Succession.—Heirship.—Compensation.—Further evidence.—Trial de novo.

FACTS: An appeal from the Native Commissioner's Court, Eshowe.

STUBBS, P.: In the Court of Chief Mhlakaza, plaintiff claimed from defendant twenty head of cattle and the heirship to the Estate of the late Zizwebili.

Judgment was given by the said chief in favour of plaintiff for six head of cattle. Plaintiff appealed to the Court of the Native Commissioner that the judgment of the said chief be altered in his favour for 20 head of cattle and costs and that he be declared heir to the said Zizwebili.

Appeal was upheld and the chief's judgment amended to one for plaintiff (appellant in Native Commissioner's Court) for 28 head of cattle and costs and appellant declared heir.

Respondent in the Commissioner's Court appealed against the above judgment.

After having in this matter considered the facts, and legal position, we have decided that owing to the need for further evidence on the issues raised, the judgment of the Native Commissioner be and the same is hereby set aside and the case is remitted for trial *de novo* with special reference to the following points:—

(*a*) That the evidence already taken to form part of the proceedings in the court below.

(*b*) That the summons shall fully and clearly set out the precise nature of plaintiff's claim.

(*c*) That the Native Commissioner when determining the question as to who is the general heir to the Estate of the late Zizwebili, to specify the total number of cattle now attaching to the Estate and to which such heir is entitled.

(*d*) A copy of the original identification pass issued to plaintiff to be obtained and put in as part of the record, and the evidence dealing with its issue to be amplified as far as possible with a view to ascertaining the circumstances under which it was issued under defendant's sanction.

(*e*) That, if possible, the chief be required to give evidence to explain fully the grounds on which he based his decision for holding that plaintiff before him was illegitimate and that both parties were given an opportunity of cross-examining him. (It is noted in the present instance that neither party was given an opportunity of cross-examining the chief's representative, and that the plea was taken after he had given his evidence. This was irregular).

The chief should also be required to explain how he came to award six head of cattle to the party against whom he gave judgment on the main issue.

(*f*) Defendant at page 7 of the present Record alleges that an enquiry regarding the pregnancy of the woman Makize was held by the Headman Kotetsheni, but on the same page this witness alleges that the woman was not pregnant when Kotetsheni made his visit. How does he reconcile these two statements?

(*g*) Evidence regarding the resemblance or otherwise of plaintiff to members of the late Zizwezibili's family should be recorded if obtainable.

(*h*) That further evidence be secured, if possible, regarding plaintiff's age.

(*i*) That each party to have the fullest opportunity of calling further witnesses and of amplifying the evidence already recorded.

(2) That the costs of this appeal be costs in the cause in the Native Commissioner's Court.

Lugg and Ahrens, Members of the Court: We concur.

For Appellant: Mr. *Cress*; for Respondent: Mr. *Darby*.

1929. *Sept.* 10. Before Stubbs, President, Manning and Liefeldt, Members of the Court.

Agency.—Purchase of corrugated iron.—Unlawful possession.—Spoliation.—Question of onus *of proof.*

Facts: An appeal from the Native Commissioner's Court, Pretoria. Plaintiff sued defendant in the court below for the recovery of certain 60 sheets of iron or payment of their value, £22, which iron plaintiff alleged to be his property, wrongfully and unlawfully removed from the premises where the said iron was stored by plaintiff.

The plea admits removal by defendant but denies that the removal was wrongful or unlawful and that the iron is the property of the plaintiff.

Held: That the judgment of the court below, which was one for absolution from the instance with no order as to costs, was both paradoxical and unintelligible and that the only course open to this Court is to quash the proceedings in the court below, leaving it open to appellant to bring a fresh action, if he so desires, with costs of appeal in his favour, but no order as to costs in the court below.

For Appellant: *Mr. Pickard*; for Respondent: *Mr. Kraut* (instructed by Mr. Hutchinson).

Stubbs, P.: The plaintiff sued the defendant in the court below for the recovery of certain 60 sheets of corrugated iron or their value £22 alleged to be the property of the plaintiff and to have been wrongfully and unlawfully and without the consent or permission of the plaintiff removed and taken into the possession of defendant from the premises of one Alfred Mamuela, Lady Selborne, where the said 60 sheets of iron were being stored by the plaintiff.

The plea admits removal of the iron by defendant from plaintiff's premises and denies such removal was wrongful or unlawful. Defendant denies that the iron is the property of the plaintiff but states that he (defendant) is the owner thereof.

The Native Commissioner on the question of *onus* which apparently had been raised at the commencement of the hearing decided that it rested upon plaintiff and he gives the following reasons for doing so:—

"At the commencement of the trial I was called upon to decide whether the *onus* of proof rested upon the plaintiff or the defendant and I held that it was upon the plaintiff and the reasons for the conclusion to which I came are the following:—

"The rules of this Court indicate clearly that it is intended to simplify the procedure as mush as possible, freeing it from all technicalities (in so far as possible without prejudicing the rights of the parties to a suit), and to get to the root of a dispute before the Court, without going through all the formalities in pleading, etc., that are necessary in Superior Courts and magistrates' courts.

"With this in mind I came to the conclusion that defendant's plea (broadly interpreted in the light of what I have said) is in effect a denial that plaintiff had the control of the corrugated iron and that the defendant's denial that the removal was wrongful could reasonably be held to embrace a plea denying that the plaintiff was in legal possession of the iron; especially as it appears from the summons that the iron was upon the premises of a third party. It might have been under his control and defendant's case might have been that he had got this third party's consent to the removal. For this reason and because both parties claimed the ownership of the goods; and the judgment of the Court, I felt, should, if possible settle the whole dispute between them. I held that the *onus* was on the plaintiff."

The simple test in this case is, if the spoliated party had instituted proceedings for spoliation against defendant instead of by way of action for the return of the iron, on whom would the *onus* have fallen? Clearly the defendant.

If A goes to the premises of B and in the same circumstances removes his motor car to other premises must B be called upon from the outset to explain why A removed the car or to show that he has a better title in the car than A? This proposition would in my opinion be the *reductio ad absurdum*. But the Native Commissioner goes on to state: "I do not think, however, that my ruling on this point affected my final judgment, for on the facts I accepted the defendant's evidence in preference to that of the plaintiff who did not give his evidence in a straightforward manner, and whose demeanour in the witness box did not impress me as that of a person who spoke the truth," and concludes by stating:

"On these facts I would have given judgment for the defendant with costs, but I desired to indicate to defendant and other natives to whose knowledge this matter might come that the law does not look favourably upon a person who enters the property of another to remove goods without the other's express consent, for this reason I deprived him of his costs and entered a judgment of absolution from the instance with no order as to costs." So that, in effect, while holding that defendant had established his claim to the iron and that its removal to his premises was neither wrongful nor unlawful, he granted absolution against him. The effect of the judgment is to leave defendant in possession, not only that, he has decided that the ownership vests in the defendant, thus effectively closing the door to any further action by plaintiff which such a judgment is intended to leave open to the unsuccessful party. If, as the Native Commissioner says, he found as a fact the iron in dispute was the property of defendant and that its removal by him from the possession of a third party was not wrongful or unlawful, by what process of reasoning can he hold that defendant was not entitled to judgment in his favour instead of absolution from the instance? He endeavours to supply the explanation in the following terms:

". . . . but I desired to indicate to defendant and other natives to whose knowledge this matter might come that the law does not look favourably upon a person who enters the property of another to remove goods wthout the other's express consent, for this reason I deprived him of his costs and entered a judgment of absolution from the instance with no order as to costs." A commentary on his finding that the removal was neither wrongful nor unlawful!

The Native Commissioner has indicated in his judgment that the rules of Native Commissioner's Courts intend to simplify procedure freeing it from technicalities as much as possible, but it is as well to remind him that it was never contemplated to allow such latitude and elasticity as to make procedure and practice unintelligible and meaningless.

The judgment is both paradoxical and unintelligible.

The only course open to this Court is to quash the proceedings in the court below leaving it open to appellant to bring a fresh action, if he so desires, with costs of appeal in his favour, but in the matter of costs in the lower court in common justice to defendant this Court cannot order him to pay them as he is in the

curious position of having on the judgment of that Court won, and yet lost his case, he might, however, possibly find consolation in the possession, for the time being at any rate, of the iron.

I express no opinion as to the success or otherwise of a cross-appeal as none has been lodged.

MANNING and LIEFELDT, Members of Court: We concur.

BROWN MABOTE v. FRANZINA MOHLOHLANE.

1929. *October* 23. Before STUBBS, President, MANNING and LIEFELDT, Members of the Court.

Native law.—Customary union.—Desertion.—Property rights in minor child.—Proof of payment of lobolo *or* bohadi.*—Paternity and custody of illegitimate child.*

FACTS: An appeal from the Native Commissioner's Court, Krugersdorp. Appellant claimed from respondent who deserted him, the delivery of two minor children on the ground that he was married to respondent by *lobolo* which had not been returned to him. The respondent denies that appellant was the father of the first child and that there has been a marriage according to Native custom, as *lobolo* has not been paid in full.

The Court had to decide on the following points:—

(1) Whether in order to succeed in an action by the father for the property rights in children born of a customary union it must be proved that *lobolo* in full has been paid?

(2) Whether as a matter of course in Native law and custom and in the absence of an express condition when a *lobolo* contract is concluded, a child born to a woman as the result of illicit intercourse with a man, is *ipso jure* acquired by another man who subsequently contracts a customary union with the woman and pays *lobolo* for her.

HELD: That in modern Native law the payment of *lobolo* either in part or in full before the consummation of a customary union does not affect its validity and it was not necessary for purposes of deciding the issue of the property rights in the two children to show that *lobolo* has been paid in full before the union was consummated.

HELD (LIEFELDT dissenting): That the property rights in an illegitimate child vest not in the man who subsequently contracts a customary union with its mother, but in the mother's father. *Nowata* v. *April*; *Luhleko* v. *Piyose Langeni*; *Tabankulu* v. *Dyarashe* (N.A.C.R. 1894-1909, pp. 260-263); *Mqurubana* v. *Mancita* (N.A.C.R., vol. V, p. 31); Seymour on *Native Law and Custom* (p. 89 and 90); *Ngwena* v. *August and Another* (N.A.C.R. 1918-1922, pp. 48-49).

ORDER: In the absence of conclusive evidence of the paternity of the first child the judgment should have been one of absolution from the instance as regards the illegitimate child and as regards the custody of the second child, judgment for appellant with costs in the court below and costs of appeal. The judgment in the court below is altered accordingly.

For Appellant: Mr. *J. H. Humphreys*; for Respondent: Mr. *Montsioa*.

STUBBS, P.: This matter came in appeal before the Court at its session at Krugersdorp on the 10th of September and after argument it was decided to refer it back to the Court of first instance to take the opinion of Native Assessors on the following points:—

(1) Whether in order to succeed in an action by the father for the property rights in children born of a customary union it must be proved that *lobolo* in full has been paid?
(2) Whether as a matter of course in Native law and custom and in the absence of an express condition when a *lobolo* contract is concluded, a child born to a woman as the result of illicit intercourse with a man, is *ipso jure* acquired by another man who subsequently contracts a customary union with the woman and pays *lobolo* for her.

In the course of argument the point arose of the competency of the respondent to be sued unassisted, but as it was established that the witness Petrus Mohlohlane appeared to assist the respondent as *de facto* guardian, it was held that the defect had been remedied.

The claim in the court below is for the property rights in two children alleged to have been born of the customary union of appellant and respondent.

The facts disclose that the parties became man and wife in 1922 and *lobolo* was paid, the actual amount is in dispute. They lived together for upwards of seven years but owing to differences between them she left him last year taking with her the two children in question and refuses to return or allow him to have the two children.

The paternity of the first child is disputed, respondent alleges that she was seduced by one Gibson resulting in the birth of the first child before her union with appellant. She was then under the guardianship of her father who died some time subsequently. Respondent's evidence is that action was taken by her father against Gibson in respect of the alleged seduction and although two head of cattle were awarded as damages he failed to make reparation. There is evidence of her pregnancy before the customary union with appellant. Crio Mabote, appellant's own witness, states: " When the plaintiff took over the girl she was pregnant when I paid over the £10 (*lobolo*) she was pregnant."

Respondent states: " I was present when the marriage arrangements were made . . . . . I had one child at this time by another man, the child is named Simakalina, a girl . . . . . The child was born before he asked for me in marriage. Gibson is the father of my child."

Mantata John, a witness who might have thrown some light on the matter, was unfortunately not questioned, but he makes the significant admission: " No steps have been taken to recover the balance owing in the bohadi . . . . . "

The mother of respondent states: " My daughter had one child Simakalina before the plaintiff (appellant) came on the scene . . . . The other child belongs to plaintiff . . . . . Gibson is the father of my daughter's child. A Likgotla was held in connection with Gibson's seduction of my child . . . I know Gibson well." Petrus Mohlohlane who claims to be and has been accepted as the respondent's *de facto* guardian states: " I know my daughter's children. The plaintiff (appellant) is the father of the second child."

This witness after describing the formalities of a Native wedding and the mode of procedure in the giving of presents to the bride's parents and the payment of Bohadi makes the pertinent statement in regard to the first child: " Under Native custom the child would belong to the girl's parents . . . . The custody of the child belongs to the girl's parents and not to the plaintiff." Appellant on the other hand, contents himself with the bald statement that

the two children are his and he claims them. Captain Nkuna, another of his witnesses, merely states: "At the time of his mar riage plaintiff had no children." Whether or not he means the defendant is left in doubt.

In deciding the paternity of the first child the Native Commissioner on the dates which, in the course of evidence, have been rendered very uncertain indeed, has sought to calculate the period of respondent's gestation and the actual date of the first child's birth. But whether it was born 242 days or 280 days after the alleged cohabitation with Gibson, I gravely doubt if on the facts, which I have lengthily reviewed, the court below was right in deciding, in the absence of more definite evidence from appellant, that it has been conclusively proved that he is the father of the first child.

In deciding the issue involved the Native Commissioner seems to have mainly concerned himself with the actual sum constituting the *lobolo* agreed upon between appellant and respondent's late father and inferentially he seems to have taken the view that payment in full of *lobolo* is essential to the validity of a customary union and because he has not been able on the evidence to determine the actual amount involved and whether or not it has been paid in full he has granted absolution from the instance with costs in favour of respondent.

For the purposes of this action the two main grounds which fall to be dealt with are:—

(1) The existence of the customary union.

(2) The paternity of the two children, and these he has decided in favour of appellant but has held he is not entitled to succeed because, as stated, it has not been established to the satisfaction of the Court that the full *lobolo* or bohadi has been paid. In this he is in law clearly wrong. In modern Native law the payment of *lobolo*, either in part or in full, as distinguished from the actual agreement to pay *lobolo*, before the consummation of the customary union does not affect its validity and it was not necessary for purposes of deciding the issue of the property rights in these two children to decide whether *lobolo* had in fact been paid in full before the union was consummated. Even if this had been necessary, there is, as has been emphasised by Mr. Humphreys in his argument, a good deal of evidence to establish that the full *lobolo* had been paid and that that *lobolo* was not £30 as the

Native Commissioner is inclined to believe but £22. If I were wrong in this view it is remarkable that there is not a scintilla of evidence to explain why no action has been taken for the recovery of the balance over a period of seven years during which appellant and respondent have lived together as man and wife.

The Native Commissioner once having found, as I think he rightly did, that there was a *de facto* union should have addressed himself more particularly and with greater attention to the evidence on the question of the paternity of the first child. It seems to me he has not formed a proper judgment of the relative value of the evidence in this regard and I find it impossible to concur in his acceptance of the very meagre evidence tendered in appellant's behalf as against the evidence of respondent and her witnesses.

It has, however, been argued that even if it be found as a fact that the first child was not born of the union of appellant and respondent but is the offspring of prior illicit relations of Gibson and respondent, appellant having paid *lobolo* for respondent is in law entitled to the property rights in the child.

I, unlike my brother Liefeldt, am not able to accept the opinion of the two Assessors, Ezekiel and Jacob of the Bathloko Tribe to the effect that property rights in an illegitimate child vest by operation of law in a man other than the seducer and natural father who subsequently contracts a customary union with the mother of the child and pays *lobolo* for her, as against that of Assessors Archibald S. Mbelle, Abner Mapanya, Philemon Mzondi and Kofie Skobobana who all agree that the property rights vest in the woman's father, but the latter three qualify by asserting that such rights might pass from the mother's father to her husband on payment. Archibald S. Mbelle on the other hand is quite definite that such property rights vest in the woman's father only.

The latter view finds more ready acceptance with me in support of which the following decisions of the Transkeian Native Appeal Court may be quoted:—

Nowata v. *April*: Defendant had married (paid dowry) plaintiff's daughter Julia, and, at the time of marriage Julia had an illegetimate child (daughter) by another man. This illegitimate child was afterwards married from defendant's kraal and dowry received for her by defendant. Plaintiff, the father of Julia, claimed this dowry.

On appeal it was held that "in the ordinary course of Native custom such a child, being illegitimate, would belong to the woman's father and a deviation from this must be supported by the clearest evidence."

In the case of *Luhleko* v. *Piyose Langeni* the facts were: Plaintiff was not the father of the child Ruth, but that Ruth was the offspring of an illicit intercourse between plaintiff's wife Selina and a man named Charles Mvunyiswa, and that Ruth was born prior to plaintiff's marriage with Selina.

On appeal, the Court held, "No right whatever would be conferred on him (plaintiff) by a Native marriage *per se*, and if he be not the natural father of Ruth then no marriage, either under common or native law can *per se* confer upon him any right in Ruth."

In the case of *Tabankulu* v. *Dyarashe* (N.A.C.R. 1894-1909, pp. 260-263) the defendant had married a woman named Kemete, the daughter of the plaintiff, and defendant and Kemete gave in marriage a girl named Nonesi, whom plaintiff claimed as his property and in respect of whom and the dowry paid for her the plaintiff claimed a declaration of rights. The statement of the plaintiff was that many years ago he gave his daughter Kemete in marriage to one Nkovu and that the girl Nonesi was the issue of that marriage; that this marriage was dissolved by suit before the Chief Dudumayo and that all the dowry paid by Nkovu was restored to him and that in consequence the issue of this marriage —the girl Nonesi—became his property, plaintiff stated that he later on gave the woman Kemete in marriage to defendant and that they in 1907 borrowed the girl Nonesi and then, without his knowledge and consent, gave her in marriage as above stated and exacted dowry for her.

On appeal the Court held: " . . . . upon Nkovu's repudiation of the marriage and receipt of the whole dowry paid by him she would belong to plaintiff, the father of her mother, and not to defendant, who paid no fine for her mother's seduction. With regard to the contention that the girl Nonesi became the property of defendant by virtue of the payment of two head of cattle for her when she married her mother, this Court is of opinion that it must be guided by the decision in the case of *Nowata* v. *April*."

There is also the case of *Mqurubana* v. *Mancita* (N.A.C.R., vol. V., page 31) which decides the ownership or property rights in an illegitimate child.

Seymour on *Native Law and Custom* (pages 89 and 90) says, "A father of a seduced woman is guardian of her child, and can claim custody, even against its mother.' He quotes *Bewbew* v. *Denis* (J., 21, p. 139) and *Takayi* v. *Mzambalala* (B., 1906, H. p. 121) (where the woman's father was sued). In page 90 he says, "It is customary for a man marrying the girl he has seduced to pay her guardian an extra beast to entitle him to their illegitimate child, but he cannot buy children born of his wife by other men previous to his marriage." He quotes *Madangalazana* v. *Marwanya*, (K., 1903. (i.e. Kokstad) Appeal Court).

Another case which has some bearing on this matter is that of *Nqwena* v. *August and Another*, (N.A.C.R. 1918-1922, pages 48-49) in which the claim was "for declaration of rights to a certain girl Tandiwe, illegitimate child of Plaintiff's sister Sophia, born to her prior to her marriage with defendant." The President's decision in this case was based on the case of *Nowata* v. *April*. Defendant's appeal was dismissed and "plaintiff declared to be the rightful guardian of the girl Tandiwe, and entitled to any dowry paid for her."

These, it is true, are Transkeian decisions involving principles of law among the tribes of that territory, but there is no satisfactory evidence or authority to show that there can be any appreciable difference or variation of this fundamental rule between the tribes of that territory and the people involved in this action. That being so, and assuming that the illegitimacy of the first child had been definitely established, I think it has been abundantly demonstrated that property rights in such child in the circumstances disclosed in this case would vest not in the Appellant but in the mother's father. But as considerable doubt has been thrown on the paternity of the child which the court below should not have overlooked, the judgment should have been absolution from the instance in respect of the first child Simakalina and in regard to the second child Sinoda, judgment for appellant with costs.

The judgment in the court below is altered accordingly with costs of appeal to appellant.

C. N. Manning, Member of Court:— (1) Although there is divergence in the views expressed by the six Assessors for whose opinion this point was referred back, it is observed that whilst

some emphatically state that the father of children born of a customary union has property rights in them even if the full *lobolo* has not been paid, others who do not endorse this view indicate that the mother's own family may hold her and the children more for the sake of security for payment of any balance of dowry than as a matter of ownership in them.

If is a common practice amongst the group of tribes to which respondent belongs, for only a portion of the dowry to be handed over when a woman is taken in marriage, the balance being by arrangement paid later, and this is frequently promised and obtained from dowry received for a daughter of the union.

In the case before us, it is shown that a contract of marriage was entered into and that at least part of dowry was paid to respondent's father by appellant who lived with the woman as his wife, and in these circumstances certainly had the child Sinoda by her, thus, in my opinion, acquiring a legal right in such child.

This might not deprive respondent's family of a possible lien on the woman and child for alleged balance of dowry, but as neither the witness Petros Mohlohlane who says he is the guardian of respondent, nor the latter have definitely pleaded this remedy and no counterclaim has been made in the case, appellant should succeed in his claim for the return to him of the child Sinoda.

(2) Concerning the paternity of the first child Simakalina, I am not convinced that respondent's evidence (supported by her mother, the only surviving parent), should be rejected in favour of appellant owing to the discrepancies as to dates mentioned by respondent and the fact that Gibson was not called by the defence as to his alleged previous relations with Franzina.

As appellant has not, to my mind, conclusively proved that Simakalina was a child born of the customary union between him and respondent, his claim to her may alternatively be considered in connection with the second point referred for the views of the Assessors.

They have answered the question in the negative by a majority of four to two and although the latter belong to the tribe of respondent and in effect decide against her, I find difficulty in accepting their views, based on a purely tribal custom, as conforming with fundamental Bantu law. There is overwhelming native opinion to the contrary.

The universal principle is that the child of an unmarried woman belongs to her family, which must therefore be consulted

and agree in regard to its future life. If the mother subsequently enters a customary union and the child is still very young it is allowed to accompany and remain with her for a time although property rights in it are not lost unless these be transferred by agreement and generally extra payment when the *lobolo* contract is made. If a man, other than the seducer, simply by paying *lobola* for a woman could claim as his property any illegitimate children she had previously, absurd results might arise and it is conceivable that on finding an illegitimate though marriageable daughter of the woman, he would try to take her or any dowry in respect of such girl and if already paid make a claim for it. The maxim "*lobolo* cattle paid for the woman beget the children and not the man," though applicable to children born to a woman after she has entered into a customary union and whether or not her husband is the natural father, should not operate in the matter of children born of illicit intercourse between the mother and another man prior to the customary union unless otherwise agreed upon.

As regards the claim for the child Simakalina, the decision of the Native Commissioner, viz. absolution from the instance, although arrived at from somewhat different points of view, should be upheld. The appellant is thus entitled to bring further evidence should he wish to do so as regards the paternity of the child or on a possible alternative claim that even if he is not the real father of Simakalina, he had acquired a right to her.

However, in this latter connection a further point not previously discussed, might have to be considered, i.e. whether, even if extra payment is made for an illegitimate child, the man—particularly one of a totally different tribe and country—would not break a principle of public policy and natural justice (*vide* sec. 11 (1) Act 38/1927) by separating and removing such child from its mother and her family.

In the present case the mother's return has not been claimed but only that of her child Simakalina and the mother contends that appellant is not related to it by blood.

Liefeldt, Member of Court: 1. Whether in order to succeed in any action by the father for the property rights in children born of a customary union it must be proved that *lobolo* in full has been paid? In answer to this question Assessors Archibald S.

Mbelle and Ezekiel Masipa are very definite in their opinions to the effect that the property rights in the children born of a customary union are vested in the husband and that such right is in no wise affected by the fact that *bohadi* was not delivered in full.

Assessors Abner Mapanya, Coffee Skobobane, Philemon Mzondi and Jacob Lehao however express a different opinion, they hold that the husband must before he can claim full property rights in the children born of a customary union, show that he has paid the *bohadi* in full, in other words they admit that the husband and natural father has a right in the children but not a full and complete right until the *bohadi* is all paid. He has the right they say to give his daughter in marriage and collect *bohadi* for her, out of which he in turn is required to discharge his obligation in respect of the *bohadi* still due and claimed from him, by his wife's father. It therefore seems that if the parent of a child is admitted to have the right to arrange and give such child in marriage then surely this must be considered a full and complete right by a father in his child, though it may be that the father-in-law retains an implied claim on the child as a means for the recovery of the bohadi still due to him. Thus it appears to me that these Assessors when giving their opinion were more concerned in the security of and the method the woman's father could adopt in recovering full payment of the *bohadi* rather than the question of the husband's property rights in his own children.

Native law as distinct from Native custom is based on equity but it would appear the very reverse if it were possible for any person because *bohadi* had not been paid in full, that such person shall have the right to deprive the parents of their child or children, and though it may be customary to threaten such action I certainly have in my experience never known it to be carried into effect.

Whether as a matter of course in native law and custom and in the absence of an express condition when a *lobolo* contract is concluded, a child born to a woman as the result of illicit intercourse with a man, is *ipso jure* acquired by another man who subsequently contracts a customary union with the woman and pays *lobolo* for her?

In answer to this question Assessor Archibald S. Mbelle maintains that the husband who has contracted a customary marriage has no property rights in the illegitimate child of his wife born

prior to their marriage and of whom he is not the natural father. Assessors Abner Mapanya, Philimon Mzonde and Coffee Skubutana on the other hand assert that such rights although vested in the father of the woman can be acquired by her husband provided he gives some consideration to the woman's father.

Assessors Ezekiel Masipa and Jacob Lehao both hold an entirely different opinion and according to them there is no doubt whatever that when a woman marries, the property rights in her illegitimate child pass with her from her father to her husband.

It will be noted that both the Assessors Ezekiel and Jacob are Batlokoa of the same tribe as the defendant and now respondent, whilst appellant is a Shangaan. Therefore the native law to be applied in this case must as laid down in sec. 11, sub-sec. (2) of Act 38 of 1927 be that prevailing in the place of residence of the defendant. That being so, this Court must be guided by the opinions expressed by the Assessors Ezekiel Masipa and Jacob Lehao in preference to the other Assessors who belong to native tribes different from that of the respondent to this action, and after giving careful consideration to the opinions expressed by these two assessors I am of opinion: (1) That to succeed in this action it is not necessary to prove that *bohadi* or *lobolo* has been paid in full. (2) That when a customary union has been concluded and no expressed condition is made by the father of the woman in respect of any illegitimate children she may have the property rights of such children pass simultaneously with the mother from her father to that of her husband.

The fact is fully established in this action that at least £10 passed in respect of *bohadi* and a customary union was thus concluded.

And even if it is admitted (which the court below did not do) that respondent at the time she was taken to wife by appellant had already given birth to the illegitimate child "Simakalina" it still remains to be shewn that there was an express condition made by respondent's father in regard to extra consideration being paid to him by her husband in respect of this child, there is however no evidence whatsoever on this point, in the absence of which it must be assumed that respondent's father in permitting this child to accompany its mother without let or hindrance when she joined her husband, he did by this act convey the impression that he waived any claim to extra remuneration and consented to the

property rights in this child automatically passing with its mother from himself to that of her husband.

This being so I am of the opinion that the appeal should be allowed and appellant given custody of the two children.

For Appellant: Mr. *Humphreys*; for Respondent: Mr. *Montsioa*.

CHARLES SOLOMON MUGUBOYA v. WILLIAM MUTATO.

1929. *November* 13. Before STUBBS, President, MANNING and GOLDSWORTHY, Members of the Court.

Defamation.—Damages.—Native custom.—Jurisdiction.—Section 11 (1) of Act 38, 1927.—Exception.—Costs.

FACTS: An appeal from the Native Commissioner's Court, Tzaneen. Appellant claimed £50 damages for defamation of character.

Both parties being Natives, exception was taken to the summons in the court below, in that according to local Native custom slander is not actionable. The summons was dismissed with costs.

HELD: That the Court was not called upon to decide whether slander under Native law is actionable or not.

That the Native Commissioner was not bound to deal with the matter according to Native law. Under sec. 11 (1) of Act 38, 1927, he had power to try the action either by Native law or Common law. If the aggrieved party had no redress under Native law, the law providing the remedy should have been applied.

The appeal is allowed with costs and the judgment in the court below altered to one dismissing the exception with costs.

For Appellant: Mr. *L. Caplan*; for Respondent: *Mr. G. J. Maritz* (in default).

STUBBS, P.: This is an appeal from a judgment of the Assistant Native Commissioner, Tzaneen, allowing an exception to the plaintiff's declaration in an action claiming damages for defamation.

Jurisdiction is conferred on the court below by sec. 10 of Act 38 of 1927, and sec. 11 (1) of the same Act lays down, *inter alia*, that " notwithstanding the provisions of any other law, it shall be in the discretion of the Courts of Native Commissioners in all suits or proceedings between Natives involving questions of customs followed by Natives, to decide such questions according to the Native law applying to such questions except in so far as it shall have been repealed or modified: Provided that such law shall not be opposed to the principles of public policy or natural justice."

Both parties to this action are Natives. The Native Commissioner in the exercise of his discretionary power upheld the exception to plaintiff's declaration on the ground that according to local Native custom slander is not actionable.

The Native Commissioner in giving reasons for upholding the exception states:—

(1) According to local custom slander is not actionable.

(2) Both parties to this action are natives in Muguboya's Location.

(3) This case therefore should have been brought to the notice of the tribal council, and the matter discussed, as to whether the tribe should take proceedings in the matter.

Divergent views have been expressed and conflicting decisions given by the Courts administering Native law as to whether slander is actionable.

Up to the time of Mr. Arthur Stanford's appointment to the Chief Magistracy of East Griqualand, it was held by the Court that among the tribes of that territory slander was actionable, and in 1905, in fittingly describing the Native viewpoint, the Court said: " There is a mistaken idea among Europeans that, according to Native custom, there is no slander action. ' He has made me a thief; he must wash me; I come to you to complain,' was the form of the plaint often heard by Native chiefs prior to annexation."

Colonel Maclean, C.B., in his *Compendium of Kaffir Laws and Customs*, published in 1847, says: " Originators and spreaders of a . . . . . libel or scandal, render themselves liable to an action at law, and damages may be recovered." But in 1908 Mr. Stanford held (*Sonca* v. *Molose*, K. 1908) that there was no action for slander in Native law and this view has been confirmed by the

Appeal Courts at Butterworth and Umtata. It was, however, laid down in *Sonca* v. *Molose* (*supra*) that although no action for slander lies according to Native custom, the magistrates are not bound to try every case between Natives according to their laws; that sec. 23, Proclamation 112 directs that all suits shall be dealt with by magistrates according to the laws in force in the Colony proper; and that, although this section also provides that cases between Natives may be tried according to the laws and customs of their tribes, the intention of its wording was, primarily, that Colonial law should apply as far as possible; but that, in order to meet special cases, provision was made whereby magistrates might try them according to Native custom; that the magistrate's discretion under this section was a judicial one; that it followed that, where there is no remedy for an evil under Native law, Colonial law must be applied; and that, in cases of libel and slander, magistrates should, for these reasons, be guided by the Colonial law." In another case, *Poni* v. *Neleka* (4 J. 219), it was held that the magistrate had power to choose whether he would try a slander action by Native custom and throw it out, or whether he would decide the case under Colonial law and go into the merits; that this power given to a magistrate is a judicial one and the Appellate Court was not bound by his choice.

Although this Court is not bound by the foregoing decisions it seems clear that it is at least arguable whether among certain tribes action for slander does not lie. It has been made actionable by the Natal Code based, presumably, on principles of Native law among the Natives of Natal. It may or may not be that among one or other of the tribes to which the parties in this action belong, slander is actionable. There is no evidence on the point to guide us. It may have been an unknown thing—except in its relation to sorcery or witchcraft—among primitive tribes of a century ago for slander to be actionable, but through contact with white civilisation and the steady advancement towards higher standards of culture and society it is conceivable that a corresponding development in principles of Native law along lines more in consonance with our ideas of natural justice has modified, if not abrogated customs that are inconsistent therewith. But I wish to guard myself against laying down in definite terms that slander among the tribes to which the parties belong, in the absence of authoritative evidence, is action-

able. In my view, that would require to be established by evidence. And, as there is no evidence on the point we are not called upon at this stage to decide it but to decide merely whether, as it was open to the Native Commissioner in the exercise of his judicial discretion to hear the case at Common law, he has exercised a proper discretion in electing to decide the matter in accordance with Native law. Assuming he was satisfied that in Native law no action lay, he was not bound to deal with the matter according to Native law. Under sec. 11 (1) of the Act (*supra*) he had power to choose whether he would try the action by Native law or common law. If, in his view, by the former the aggrieved party would be without redress, but by the latter would have redress, then, obviously he should have applied the law which provided the remedy. That being so, the Native Commissioner was wrong in taking cognisance of Native law and disregarding the Common law.

The appeal must therefore be allowed with costs and the judgment in the court below altered to one dismissing the exception with costs.

It has been brought to our notice that in the court below when the parties appeared—both represented by attorneys—only the question of the exception was dealt with and defendant was not called upon to plead nor to state whether he had a counterclaim. In view of the provisions of paragraph 26 (*a*) of the Regulations for Native Commissioners' Courts and the necessity to clarify issues and obviate costs besides any avoidable inconvenience to parties, we are of opinion that it would have been better had the defendant been called upon there and then so to plead or that within a reasonable time the plaintiff should have had notice of the plea which has, evidently, not been given up to date, so that even at this late hour he does not know what defence he has to meet.

Manning, Member of Court: Where a suit between natives is brought and based on principles known only in Native law though not opposed to public policy and natural justice, the question at issue is governed by that law. If the cause of action is one recognised by and capable of being tried under Common law, a party cannot be deprived of the ordinary civil remedy either because he is a native or that the subject-matter is not or may not be actionable in Native law. Otherwise all natives, including those whose mode of life is in conformity with European ideas,

would be liable to lose their rights of appeal to the Courts in all civil matters except in those involving Native custom. The fact that the Legislature has expressly recognised as actionable by natives certain customs followed by them, does not restrict the Common law.

There is nothing in the case before us to show that it is based on Native custom or purports to be brought under Native law. On the contrary it would appear from the nature of the summons and amendments that the common law was relied on. The record indicates that plaintiff tendered evidence as to defendant refusing to submit to the jurisdiction of his chief. In view of this point and the ruling of the Assistant Native Commissioner that according to local custom the matter was not actionable, it is not clear why it was held that the case should have been brought to the Tribal Council for the tribe to consider further proceedings, unless for purely administrative purposes. Sec. 12 of Act 38 of 1927 does not make it imperative for a tribesman to bring a case to his chief in the first instance.

I am of opinion that the exception should have been overruled on the ground that plaintiff is entitled to sue under the Common law for any damages arising out of alleged slander whether or not it be actionable under Native law and custom. However, referring in the latter connection to appellant's submission that the presiding Commissioner in the absence of evidence, was not justified in deciding that according to local Native custom slander is not actionable, I am of opinion that argument can only be accepted in particular instances such as the one now before us and not as a general rule—*Vide Morake* v. *Dube* (T.P.D. August, 1928) deciding *inter alia* that Native Commissioners may apply Native law and custom as they know it without necessarily calling evidence on the point.

Goldsworthy, Member of Court: This is an appeal from a judgment of the Assistant Native Commissioner, Tzaneen, allowing an exception to the plaintiff's declaration in an action claiming damages for defamation.

Both parties to this action are Natives. The Native Commissioner in the exercise of his discretionary power upheld the exception to plaintiff's declaration on the ground that according to local Native custom slander is not actionable.

To hold in these modern days and with Natives at their present general state of civilisation that no Native has any legal remedy for defamation in the judicial Courts of the land, simply because his old Native custom may have afforded him none, would be a travesty of natural justice and a violation of the fundamental right to inviolability of person to which everybody is entitled. It is interesting to note, although this Court is in no way bound by such decision, that this view has been adopted by the Appeal Court in the Transkei—in the case of *Mqukama* v. *Sam Ngcongolo*, heard on the 7th March, 1913, and in the matter of *Nomtitinya* v. *Emma Mqaka*, decided on the 15th April, 1912.

To hold otherwise would be to disregard the Common law and also the saving clause, provided in sec. 11 of Act 38 of 1927, relating to the application of Native law and custom in the Native Commissioner's Courts.

Plaintiff in his reasons for appeal contends that the presiding Commissioner was not justified, in the absence of evidence, in deciding that according to Native custom slander is not actionable.

In reviewing this question it appears to me that the permissive powers conferred on the Court by sec. 19 (1) of Act 38 of 1927 amply furnish the answer. It is there laid down that a Native Commissioner is, if he considers it desirable, at liberty to call in the assistance, in an advisory capacity, such Native assessors as he considers necessary. There is no injunction that he must call in such assistance. The law presupposes that the presiding officer is versed in Native law. Naturally, if he is in doubt as to what the Native law and custom is, he should either get the parties to lead evidence or he should call to his assistance expert assessors.

The point in question was decided in *Morake* v. *Dube Dube* by the T.P.D. on the 15th August, 1928. The matter, however, then arose in regard to the interpretation of the provisions of Law 4 of 1885 where the wording, in my opinion, is not so clear.

I concur that the appeal must be upheld with costs and the judgment in the court below altered to one dismissing the exception with costs.

1929. *November* 13. Before STUBBS, President, MANNING and GOLDSWORTHY, Members of the Court.

Defamation of character.—Claim for damages.—Provocation.—Weight of evidence.—Absolution.—Costs.

FACTS: An appeal from the Native Commissioner's Court, Pretoria. The appellant (plaintiff in the court below) sued the defendant for £25 damages in respect of defamation. The Assistant Native Commissioner granted absolution from the instance with costs.

Appellant appealed against this judgment on the grounds that it was bad in law and against the weight of evidence.

HELD: That an essential in an action for damages is that the publication shall have been made maliciously, with intent to injure. The circumstances in this case negatived the existence of malice in that the words were spoken without premeditation during an altercation of a violent nature. The appellant had failed to establish her case. The appeal was dismissed with costs.

For Appellant: Mr. *R. W. Edelstein*; for Respondent: Mr. *T. P. C. Boezaart*.

GOLDSWORTHY, Member of Court: The appellant, plaintiff in the court below, sued the defendant in the Court of the Native Commissioner, Pretoria, for £25 damages in respect of defamation. The Assistant Native Commissioner after hearing both parties granted absolution from the instance with costs. From this judgment the plaintiff has appealed.

In her declaration the plaintiff alleges that on the 4th June, 1929, defendant addressed certain defamatory words in the presence of others to her, viz., "Ke sefebe," which translated means "You are a prostitute." Defendant's plea is a denial that she used the words.

The evidence adduced on behalf of both parties is of somewhat scanty nature. The plaintiff in the course of her evidence-in-chief says "Defendant used obscene language against me; she called my private parts and said I was a prostitute and sleep with white men and Natives.' Later she says "I cannot say what caused the quarrel, this is the first quarrel I had with defendant this year." In cross-examination, however, she says that the quarrel was over

her house. It is significant that she uses the word "quarrel" which must mean or imply that angry words were exchanged. At the same time she denies that she said anything to defendant or replied to the words complained of. Here she is corroborated by her husband, the other witness for the plaintiff, who states in the course of his evidence "There was no argument between my wife and defendant. Defendant simply came out of her house and made use of the words. My wife and defendant are good friends. There was no quarrel between them." This witness gives no motive, whatsoever, for the alleged defamatory statement and asks the Court to believe that the parties were perfectly good friends at the time.

Defendant in her defence says that there was a quarrel and that she and plaintiff were both very angry and swore at each other. This certainly appears to be the more likely story. She alleges that plaintiff called her a prostitute. Later in cross-examination she contradicts her previous statement when she denies that she swore at plaintiff. Coming to the evidence of Mina Monari, this woman states that there was a quarrel and that she heard both parties swearing at each other in loud voices and that the words "Ke sefebe" were used by both parties. She first heard the words "Ke sefebe" come from plaintiff, but admits that she cannot be sure that defendant did not first use these particular words. From her account the quarrel developed from an ordinary conversation. The evidence of this witness conveys the impression that it was given in a straightforward unbiassed manner, although, as she states, she and plaintiff are not on good terms, whether she is a friend or not of the defendant's is not recorded.

In examining the evidence and weighing the probabilities I cannot think that it is reasonable to believe that the defendant used the words complained of without rhyme or reason, as the plaintiff and her witness ask the Court to do.

The Commissioner, who had the parties before him and was able to judge their behaviour and demeanour in Court, says that they were both unsatisfactory witnesses. As I have remarked before, the evidence of the witness Mina conveys the impress of truth. The probabilities, too, are in favour of her statement to the effect that there was a violent quarrel between plaintiff and defendant, that they swore at each other, during the course of which both parties made use of the words "Ke sefebe." Which of the two first used

the words, it is impossible, nor in the circumstances is it necessary, to determine. One of the essentials in an action for damages is that the publication shall have been made maliciously, that is, without just cause or excuse and with intent to injure. The circumstances here negative the existence of malice in that the words were spoken without premeditation during an altercation of a violent nature.

I am therefore of opinion that plaintiff has failed to establish her case and the appeal must be dismissed with costs.

MANNING, Member of Court: The plaintiff and her husband declare that defendant called the former a prostitute without any reason or cause. Their other evidence is somewhat contradictory.

Defendant denies having used the words complained of and alleges that it was plaintiff who called her a prostitute though swearing on both sides took place. Mina, an apparently disinterested witness, also says this, and that the words were used by each party, though as far as she heard, the plaintff was the first to utter them.

I therefore consider that the Assistant Native Commissioner rightly gave absolution from the instance.

STUBBS, P.: Assuming in argument that defendant did say of plaintiff in the presence and hearing of others "Ke sefebe," these words would be defamatory *per se* and the *animus injuriandi* would be presumed. But if as a result of a quarrel provoked by plaintiff or defendant or occurring between them spontaneously and defendant called plaintiff a prostitute *ab irae impetu* the absence of *animus injuriandi* would be presumed. In other words that the words were spoken in the heat of the moment and what the one said was compensated by what the other in retaliation said. As long as the words used in retort are not disproportionate to the words first spoken and uttered on the instant. That is to say: no appreciable interval of time occurs between the words used and the retort, they are not actionable.

If there is proof of a quarrel and the defendant or plaintiff, or both, made use to one another of the defamatory words complained of, neither is liable in an action, because the presumption of *animus injuriandi* is rebutted by proof of either, or both, being in such a state of anger that they were not responsible for what they said. Mr. *Edelstein* has argued that the plea is one of denial that

the words complained of were used, and that defendant cannot now shelter himself behind a defence of *rixa* as that was not pleaded. But it is clear to me that if all the facts point to a quarrel or brawl having taken place, as undoubtedly was the case here, and one used opprobious words which are actionable *per se* and the other retaliated by using the same or similar epithets, in commotion of mind, malice is negatived, and the presumption of the intention to injure would be rebutted.

Where it is shown from the evidence that a quarrel or brawl took place in the course of which the words complained of were used in the circumstances stated it would not be necessary in order to escape liability for defendant to have pleaded as a defence that the words complained of were uttered in *rixa*. What is the effect of the denial in this case? Simply that no words were spoken by the defendant that could in law be actionable, and why does she say so? Because she has shown that the words were spoken in the heat of the moment during a quarrel and that they were provoked by epithets levelled at her by plaintiff and this, in my view, is not inconsistent with a defence of *rixa* had it been specifically pleaded.

It is unnecessary for me to review the evidence as that has already been done by the member Goldsworthy, but merely to add that the very clear account which Mina Monarie gives leaves no doubt in my mind that she has spoken the truth. She was a bystander, in no way interested in the parties or their quarrel, and apparently in a calm and collected state of mind with a better sense of values for accurate statement of fact than the two combatants, and she says distinctly that plaintiff was the aggressor; that plaintiff actually used the words "Ke sefebe" first, and that defendant, goaded by them into retort, also said "Ke sefebe," when a vocal melée ensued. They were both equally at fault. In fact on the evidence of Mina Monarie the scale slightly tips in favour of the defendant. I see no reason to disturb the finding of the Native Commissioner.

1929. *November* 13. Before STUBBS, President, MANNING and GOLDSWORTHY, Members of the Court.

Money disbursed. Contract of agency. — Onus *of proof.* — *Absolution.—Costs.*

FACTS: An appeal from the Native Commissioner's Court, Johannesburg. Plaintiff in the court below claimed from defendant the sum of £35 being money disbursed by him for and on behalf of the defendant at his special instance and request. Defendant pleaded denial.

Judgment was entered for plaintiff with costs. Defendant appealed against this judgment on the ground that it was bad in law and against the weight of evidence.

HELD: That the action was founded solely on contract of agency. That the *onus* was on plaintiff (Respondent) to establish this agency which he has failed to do.

ORDER: The appeal is allowed with costs and the judgment in the court below altered to one of absolution from the instance with costs.

For Appellant: Mr. Adv. *Morgan Evans*; for Respondent: Mr. *J. W. Hellman.*

STUBBS, P. (Delivered the judgment of the court): This is an appeal from the decision of the Assistant Native Commissioner, Johannesburg, awarding to plaintiff £29 10s. with costs of suit.

According to plaintiff's declaration he demands payment of £35 in respect of money disbursed by him for and on behalf of the defendant at the latter's special instance and request on the 14th December, 1928. The amount of the claim being made up as follows:—

£27 paid in cash to the messenger of the court, £3 expenses incurred by plaintiff in raising the £27, and £5 interest paid by plaintiff.

Defendant in his plea denies that he requested plaintiff to disburse any moneys for and on his behalf.

The defendant is a practising attorney and the plaintiff a labourer and to an extent illiterate.

From the evidence adduced it appears that on the 14th December, 1928, the defendant was financially embarrassed and in pursuance

of a judgment of the magistrate's court his house in the Klipspruit Location, which had been attached, was to be sold by the messenger of the court on that day. The judgment debt was £29 15s. 3d. being in respect of a bill for £20 which the defendant had backed for Isaac Molinda who had failed to meet the bill.

Immediately preceding the time for the sale in execution there was considerable activity on the part of defendant, Isaac and the Rev. Mpulo with a view to raising funds to stay the sale or buy in the house. The sale was timed for 10 a.m.

Plaintiff, according to the evidence, was in the magistrate's court yard to attend the sale and there met Isaac, who was a friend of his. Plaintiff in his evidence says: "Isaac asked me if I had any money to buy a house that was to be sold. I said I had £7. Isaac went to defendant and spoke to him. Defendant came to me and asked how much I had. I said £7. He said, 'Give it to me.' I gave it to him to buy a stand. I told him I also had money in the Post Office. A Native minister then took us to Mr. Leiman to buy the stand."

What part plaintiff took in the conversation and negotiations which occurred in Leiman's office he does not state. Plaintiff says that defendant went with him to Leiman's office, but did not enter, and Leiman did not see him. Isaac and the Rev. Mpulo deny that the defendant accompanied them.

From Leiman's office the parties moved to the scene of the sale and plaintiff says Leiman bought the stand and paid money to someone, but does not know to whom.

Plaintiff altogether disbursed a sum of £29 10s. in connection with the transaction of which he paid £22 10s. to Leiman and £7, the latter amount he alleges he paid to defendant personally.

Subsequent to the sale, on the 14th and 15th December, 1928, respectively, plaintiff received from Leiman two receipts for £10 each, marked "On account of R. W. Msimang," this was a refund of the money advanced by Leiman. How and why Leiman came to mark the receipt "on account of R. W. Msimang" is not recorded, but apparently because he had paid the money to Msimang.

Some time later, plaintiff does not give the date, but, from the evidence of other witnesses, it was on the 22nd December. Plaintiff, defendant, Isaac, Rev. Mpulo and defendant's clerk, Samuel Radebe, were present in defendant's office. Plaintiff states that he went there that day with the express purpose of obtaining from

defendant a receipt. He obtained a document which he now produces and which is a promissory note for £35 in favour of plaintiff signed by Isaac. Plaintiff states he was satisfied with this document as he understood it to be a receipt by Msimang.

In cross-examination by defendant, plaintiff states: "I have nothing to do with Isaac . . . I gave the £7 to you, not to Isaac . . . I did not know whether Isaac owed you money." Leiman's evidence is singularly meagre as to the part that plaintiff took in the negotiations which occurred in his office, but he says that Mpulo and two Natives came to him, of which plaintiff was one, and that Mpulo negotiated a loan on behalf of a boy of whom he took no notice. He further says: "Plaintiff promised to pay me and I trusted him." Leiman's evidence here has an important bearing on the case. He knew Mpulo, conversed with plaintiff, but, according to his statement, took no notice of the boy on whose behalf the loan was negotiated. This other boy, as he calls him, is proved in the evidence to have been Isaac. After the loan was negotiated Leiman went out of his office and handed £18 to defendant who was in the crowd attending the sale; why he handed the money to the defendant is not mentioned. He charged £5 for his services. Plaintiff has repaid him £22 10s. In cross-examination by defendant Leiman says: "You did not ask personally for the £18. . . . Your name was not mentioned." In so far as Leiman is concerned we therefore think it is clear that there was no question of the money being raised on behalf of defendant. Especially as he also says the loan was negotiated on behalf of a boy who was present and that plaintiff promised to pay and that he trusted him.

Defendant admits that he received the £18 from Leiman and £7, which, however, he says was handed to him by Isaac and not by plaintiff and he took the £18 from Leiman because Mpulo told him to take it as it was money he had raised. Mpulo, he says, he knew was interested on behalf of Isaac who was trying to raise money to pay defendant his original debt which was the cause of the sale in execution of defendant's property, and the evidence of Isaac and Mpulo bear him out in this. Only after the sale had been stayed by defendant paying the judgment debt did he, as he says, become aware of the fact that Mpulo and plaintiff had been to Leiman to raise money for Isaac.

Defendant's version of the signing of the promissory note in his office on the 22nd December is, that plaintiff wanted an agree-

ment between himself and Isaac for repayment to him of his money. There was much discussion in the Zulu language regarding the actual amount repayable, eventually the promissory note for £35 was drawn up by defendant, signed by Isaac and witnessed by his clerk, Samuel Radebe, and handed to plaintiff.

Rev. Mpulo and the witness Isaac both state that they were active in trying to raise money on behalf of Isaac with which to pay the debt due by the latter to defendant. Mpulo says: " Isaac, plaintiff and I went to Leiman. We told him Isaac wanted to borrow money and they wanted to put the bank book as security." This bears out Leiman's story when he says: " Mpulo negotiated on behalf of a boy of whom I took no notice."

Mpulo states: " I took Isaac and plaintiff to Leiman because Isaac asked if I knew of someone who would lend him money." Isaac corroborates this. Mpulo and Isaac both deny that Msimang was present at the negotiations in Leiman's office, and we do not think that there is any doubt that he was not there, as it is admitted by plaintiff that Leiman had to go into the court yard to hand over the money to defendant while the latter was attending the sale. Plaintiff's contention that defendant was in the doorway during the negotiations in Leiman's office must, in view of this evidence, be disregarded.

Isaac confirms defendant's statement that the latter was unaware that Leiman had been approached for a loan. He further says that he told plaintiff that he had a debt and that plaintiff said: " All right, I will give you the £7." Isaac's evidence is wholly in support of the contention that plaintiff advanced the money to him personally.

Isaac supports defendant that the £7 was handed to him by plaintiff and not to the defendant.

In regard to the signing of the promissory note on the 22nd December, 1928, defendant, Mpulo, Isaac and Samuel Radebe, all of whom were present, agree, and their evidence is uniform on the point, that plaintiff made no demand on defendant for the money, but wanted an agreement drawn up between himself and Isaac to secure repayment of the amount. Isaac signed the promissory note in the presence of plaintiff, Mpulo, Radebe and defendant. If plaintiff wanted, as he says, a receipt from defendant, it would be natural to expect that he would protest and refuse to accept the document when he saw that it was being signed by Isaac, instead of which he accepted the paper, and now says: " I thought

it was Msimang's receipt." The promissory note is in the English language. Plaintiff admits he knows English, and from letters written by him and handed into Court, it is clear that, while his grammar and spelling are decidedly poor, he has a certain knowledge of the language.

The Native Commissioner, in his reasons for judgment, lays a certain amount of stress on evidence led regarding defendant's financial position immediately preceding the sale in execution. There is considerable inconsistency here, and we agree that defendant has not, as he attempted to do, proved that he was not financially embarrassed. In fact, the evidence points to the fact that he only had £5 at the time. We are, however, of opinion that this is extraneous to the point in question, which is essentially whether Isaac was acting on his own behalf or as an agent for the defendant.

The Native Commissioner finds on the facts that there was a tacit agency on the part of Isaac. Now the relationship of principal and agent may be constituted, among other ways, by the express appointment by the principal. The Native Commissioner has not held, and in our opinion rightly, that there is any evidence of Isaac's express appointment as agent. Coming to the constitution of the contract of agency by implied authority of the principal, it is clear law that where a person assumes to act on behalf of another the assent of the person on whose behalf the act is done will not be implied from his mere silence or acquiescence, unless the situation of the parties is such as to raise a presumption that the act is done by his authority.

Plaintiff contends that he obtained the balance of the money from Leiman on behalf of Msimang. It is difficult, in weighing the evidence, to find any support for this contention. We have accepted as a fact that defendant was not present when Isaac and plaintiff raised the money from Leiman. Plaintiff on his own admission, did not know the owner of the stand which was being sold, and the natural conclusion then is that he did not know that defendant was in want of money. Plaintiff is a friend of Isaac, whereas the defendant is known to him only casually. Apart from the evidence of Isaac, Mpulo and Leiman, who say the contract was between Isaac and plaintiff, is it not more likely that he would lend the money to a friend rather than to a mere acquaintance, especially where no security was to be given?

We do not see how the Native Commissioner could, in all the circumstances, come to the conclusion that Isaac had implied authority to act for defendant. Isaac was personally indebted to the defendant and, owing to his default, the defendant was now being sold up. It is reasonable to believe that he should feel uncomfortable about the matter and do all in his power to raise sufficient funds to liquidate his debt to defendant.

The Commissioner found that by accepting the money defendant doubly ratified the contract. There are no grounds for this contention.

It must be remembered that Isaac was indebted to defendant and, therefore, the former had every reason to incur the obligation on his own behalf, the acceptance alone of the money by defendant cannot, therefore, be construed or inferred as conduct constituting ratification.

The evidence is clear that defendant repudiated all liability, and there is the important fact that plaintiff accepted a promissory note for the full amount from Isaac in the presence of defendant. We have already discussed the circumstances under which plaintiff received the promissory note, and we are satisfied that he knew at the time the meaning of it, and that he got the acknowledgment of debt he had sought. The weight of evidence is in favour of the view that plaintiff handed the £7 to Isaac and not to defendant. We are, therefore, unable to agree with the Commissioner that Isaac was acting as an agent under the authority, express or implied, of the defendant.

In regard to the third finding of the Commissioner, we are frankly unable to follow his reasoning. He decides . . . "that as defendant was the sole beneficiary of the loans he is liable to repay them in accordance with the legal principle that no man should be enriched at another's expense." Apparently, in view of this finding, the Commissioner would have found for plaintiff even had he come to the conclusion that plaintiff had failed to establish the contract of agency. Moreover, he has misapplied the principle of law quoted by him as there can be no *negotiorum gestor* established when a person contracted for the benefit of another person who was present at the time.

The plaintiff's action is founded solely on the contract of agency. The *onus* is on him to establish this agency, this he has, in our opinion, failed to do.

For appellant Mr. *Morgan Evans* argues that the correct judgment in the court below should have been one of absolution from

the instance with costs, and he asks this Court to sustain that argument.

The appeal must be allowed with costs and the judgment in the court below altered to one of absolution from the instance with costs.

MANNING, Member of Court: I should just like to observe in addition to what the learned President has said that whilst the summons sets out in definite terms that respondent (plaintiff in the court below) disbursed money for and on behalf of defendant (now appellant) at the latter's special instance and request, plaintiff's own evidence is almost entirely to the effect that his main object was the purchase of a stand, and he even goes further by stating that when he accepted the promissory note exhibited in the record, he was under the impression it was a receipt for a stand.

This variance between the summons and his evidence goes to support the reasons of the judgment in which I have concurred.

HENDRIK MEKGOE v. STOFFEL MEKGOE.

1929. *November* 14. Before STUBBS, President, MANNING and GOLDSWORTHY, Members of the Court.

Native chief's lekgotlas.—Procedure in accordance with recognised laws and customs of the Tribe as established by Law 4 *of* 1885, *Section* 12, *Act* 38, 1927, *and Government Notice No.* 2255 *of* 1928.—*Evidence of witnesses.—Effect given to lekgotla proceedings on statement of fact.*

FACTS: An appeal from the Native Commissioner's Court, Rustenburg. The evidence of witnesses at the lekgotla trial was rejected by the Native Commissioner on the ground that it was hearsay. This left the appellant wholly unsupported in his appeal to the Court of the Native Commissioner. The Court granted absolution from the instance with costs.

HELD: That the Native Commissioner was wrong in eliminating the evidence affecting the lekgotla proceedings as hearsay and wrongly construed the law of evidence. To hold that statements of facts in issues deliberated upon by a lekgotla, in any subsequent proceedings arising out of such deliberations and decisions in hear-

say, would be to render nugatory the very purpose of all legislative enactments that have been built around chiefs' lekgotlas.

Law 4 of 1885, sec. 12, Act 38, 1927, and Government Notice No. 2255 of 1928 affirm the principle that procedure in connection with the trial of civil disputes between Natives before a chief shall be in accordance with the recognised laws and customs of the tribe to which such chief has been appointed.

Proceedings in Native lekgotlas are *viva voce* and those who participate in such proceedings with the chief are repositories of what transpires.

The judgment of the Native Commissioner was set aside with costs and the proceedings referred back for considerations of the case on its merits.

For Appellant: Mr. *H. Cranko;* for Respondent: Mr. *M. Murray.*

Stubbs, P.: Appellant claimed in the court below firstly, 220 head of cattle, 50 goats and 50 sheep, and secondly, payment of £500 in respect of certain livestock, his property alleged to have been disposed of by his late father David during his lifetime.

The plea of the respondent denied that the deceased David was, during his lifetime, in possession of any livestock the property of appellant, but in 1912, when, as a result of a claim brought against the late David by the appellant before the chief's court at Pella, the said late David handed over to appellant all the livestock in his possession belonging to appellant.

Defendant further denied that he sold or otherwise disposed of any livestock the property of plaintiff, as or for the purposes enumerated under claims (2) (*a*) and (*b*), (1), (2), (3), (4), (5), (6), (7), (8), (9) and (10) of plaintiff's summons or that he sold or otherwise disposed of any livestock, the property of plaintiff.

Defendant says that the said late David Mekgoe in or about 1912 handed over all livestock in his possession belonging to plaintiff and since that date did not obtain possession of or become custodian of any livestock belonging to plaintiff, nor did the said late David Mekgoe enter into any transactions in respect of which any of plaintiff's cattle were sold.

A counterclaim was set up but the Native Commissioner has sent in a supplementary note to his judgment stating that he omitted to note on the record that it had been abandoned at the trial.

The Court of first instance after hearing the evidence of both sides granted absolution from the instance with costs.

On the facts before us we are called upon to come to a decision on the three following points:—

1. The origin and nature of the appellant's claim in the lekgotla.
2. The judgment of the lekgotla.
3. Whether effect was given to the lekgotla judgment?

To decide these three points involves consideration of the evidence of the two witnesses present at the lekgotla proceedings in 1912 one of whom, Molatleki Moshome, was a member of the lekgotla and inferentially participated in its deliberations, while the other, Ralibug Mekgoe, was present when the judgment of the lekgotla was delivered.

In having regard to the evidence of these witnesses upon the points referred to, it is not intended to imply that the Native Commissioner's Court was bound to give effect to the judgment of the lekgotla. But the judgment is of importance in that it furnishes evidence of the origin and nature of the claim in the lekgotla and is corroborative of appellant's claim. Molatleki Moshome in his evidence states: "... Appellant was awarded 57 head of cattle on a claim preferred by him against his father for recovery of certain livestock given to him by his grandfather." It was agreed, it is alleged, that the 57 head of cattle, with sheep and goats derived from the same source, should remain with David during his lifetime. Reference is made to a will left by David. The will was not put in. It may be that it would have thrown some light on the matters in issue, for this witness says: "... When David died, Hendrik's cattle were still in his possession." The will may have had some bearing on these matters. It may possibly have made reference to the stock bequeathed to Hendrik by his grandfather which may have gone to support his claim. Ralibug Mekgoe testifies to having been present when the lekgotla deliberated and gave judgment, and he, in corroboration of Moshome, states what that judgment was.

The Native Commissioner has rejected the evidence of these two witnesses on the ground that it is hearsay, or to quote his own words: "... The Court could not accept these statements as evidence of fact as the witnesses were repeating what they had heard at the trial." The consequence of the rejection of this evidence leaves the evidence of the appellant wholly unsupported.

The plea in its bearing on the rejection of this evidence is important. The respondent does not contend that the evidence is hearsay. If he had, there would have been a note to that effect on the Record, and he would not have admitted that action was instituted by the appellant against the late David in the lekgotla as a result of which all the livestock in David's possession belonging to appellant was handed over to the latter. Once having made this admission, evidence admitted to show how the claim was founded, the precise nature of the judgment and whether effect was given to it, must surely constitute the best evidence that could be produced and is not hearsay.

The Native Commissioner, in rejecting this evidence as hearsay, overlooked the important fact that Native chiefs' lekgotlas are not courts of record, and the best evidence that can be produced of the nature of the judgment given therein is that of a witness who either participated in the judgment or who heard the judgment pronounced. It does not necessarily follow that the evidence of such witnesses is to be believed, that is entirely a matter for the Court to decide. But when evidence of relevant facts arising out of proceedings and deliberations of a lekgotla is sought to be laid in a subsequent action in a court of law, that evidence in the circumstances referred to in this case cannot be held to be hearsay.

The Native Commissioner, in rejecting the evidence as hearsay, wrongly construed the law of evidence. To hold that statements of fact deposed to in issues deliberated upon and decided by a lekgotla in any subsequent proceedings arising out of such deliberations and decision is hearsay, would be to render nugatory the very purpose of all legislative enactments that have been built around Native chiefs' lekgotlas. Law 4 of 1885, sec. 12, Act 38 of 1927, and Government Notice No. 2255 of 1928 affirm the principle that procedure in connection with the trial of civil disputes between Natives before a chief shall be in accordance with the recognised customs and laws of the tribe to which such chief has been appointed. Even those with a superficial knowledge of practice and procedure in a Native lekgotla know, or ought to know, that all proceedings therein are *viva voce*, and those who participate in such proceedings along with the chief are repositories of what transpires in the lekgotla.

In my opinion the rejection of the evidence of these two witnesses on the facts referred to prejudiced the appellant. For these

reasons, the Native Commissioner was wrong in eliminating the evidence affecting the lekgotla proceedings. The judgment of the Native Commissioner is set aside with costs, and the proceedings sent back to him for consideration of the case on its merits.

Manning, Member of Court: In concurring with the judgment, I would remark that as the decision arrived at by the lekgotla in the matter of Hendrik's stock might have an important bearing in this case and having regard to the fact that the only means of ascertaining what such decision was, is through the *viva voce* evidence of those who have a personal knowledge of what occurred in the chief's court—which was evidently not one of record—and in view of the presiding Native Commissioner stating in his reasons that he has rejected as hearsay the evidence given by a prior and important member of the lekgotla as well as that of a Native who was present at the proceedings, and whereas these witnesses purported to rectify matters of fact relevant to the issue, I think that the court below should be asked to consider the evidence in this light and then come to a decision on the merits.

Goldsworthy, Member of Court: The nature of the claim is somewhat involved, and it is necessary to review the history of the claim from its inception. The plaintiff is the eldest son of the deceased, David Mekgoe. The relationship between father and son was very strained, culminating, in 1912, in the deceased bringing a charge of assault against his son before the lekgotla, where the latter was fined one beast. This case evidently accentuated the bad feeling as shortly afterwards plaintiff brought an action in the tribal lekgotla to compel his father to account for and to hand over to him certain livestock, which plaintiff alleged had been given to him by his grandfather. There is a diversity of opinion among the witnesses and much contradictory evidence as to the foundation of plaintiff's claim against his father and also as regards the number of cattle involved therein. Plaintiff, Molatleki Moshome, and Ralibug Mekgoe state that the claim was in respect of cattle given to plaintiff by his grandfather and that the judgment of the lekgotla was that: The cattle were to remain in deceased's possession during his lifetime, after which they were to go to plaintiff. Molatleki and Ralibug Mekgoe state that 57 cattle were involved in the judgment. For the defence it is submitted that the judgment was in respect of cattle belonging to

plaintiff's mother, this is borne out by Gerson Mekgoe and Jarius Mekgoe, who further state that no actual number of cattle was specified in the judgment.

It is a pity that no evidence was led regarding the particular Native custom on which the claim might have been founded as this would undoubtedly have assisted the Court in arriving at a decision as to the source of the claim.

From the evidence it is clear that the plaintiff bases the whole of his present claim upon the award or judgment given in the lekgotla. In fact, there is little or no evidence, apart from this judgment, adduced in support of the claim. He relies entirely upon the judgment of the lekgotla. I am of opinion that the judgment of the lekgotla is of importance, in that it is evidence of the foundation of plaintiff's claim which, whatever that may have been, originated in the lekgotla.

The Native Commissioner, in his reasons for judgment, says: "The witness Molatleki Moshome and Ralibug Mekgoe both state that they were present during the hearing of this case in 1912, and there reference was made to certain 57 head of cattle also sheep and goats, the property of plaintiff, and at that time said to be in custody of his father, the late David Mekgoe. The Court cannot accept these statements as evidence of fact as the witnesses were repeating what they had heard at the trial."

In referring to the evidence of these two witnesses, I find that Molatleki Moshome is the ex-regent of the tribe, a member of the lekgotla, and that he states definitely that there were 57 head of cattle awarded to plaintiff. Ralibug Mekgoe was present at the sitting of the lekgotla and is also definite that plaintiff was awarded 57 cattle.

The evidence of these two men bearing on these vital points was wholly rejected and dismissed by the Native Commissioner on the ground that it was hearsay. I am of opinion that in coming to this conclusion the Commissioner has misconstrued the law of evidence. The evidence of these two witnesses purported not to be an account of incidental happenings during the course of the action, but what the actual judgment was.

Native chiefs' courts (lekgotlas) are not courts of record, and the best evidence which can be produced as to the nature of a judgment given therein is to produce as a witness a person who participated in the judgment pronounced. I use the words "Best evidence" in the legal sense. Whether such witnesses, so pro-

duced, are to be believed or not is a matter for the Court to decide. In this instance one of the witnesses whose evidence was rejected by the Commissioner was a member of the Native Court (lekgotla) and the other, a witness who heard the judgment pronounced. I am, therefore, in agreement with the learned President that the plaintiff has been prejudiced by the rejection of this evidence, and that the appeal must be allowed with costs.

MAHIGANA MASUKU v. NOXAMU MHLONGO.

1929. *December.* Before E. T. Stubbs, President, H. C. Lugg and F. W. Ahrens, Members of the Court.

Native case.—Procedure.—Absolution.—Fresh action.—Remittal of case for further evidence.

Facts: An appeal from the decision of the Native Commissioner at Ngotshe. Appellant had been sued for the recovery of a horse and damages but was absolved from the instance with costs. Later the action was revived but before a different Commissioner, and on this occasion judgment was awarded against appellant for the animal claimed and certain damages.

On appeal it was disclosed that appellant was under the impression that the evidence recorded at the first trial was available to the second Commissioner and for this reason had not recalled several of his witnesses.

The Court set aside the judgment and remitted the case for trial *de novo* in order that both parties be afforded ample opportunity to call whatever evidence they required, costs being made costs in the cause before the Commissioner's Court. Appellant was not represented by counsel.

For Appellant: Mr. *Darby* (instructed by Messrs. Jan C. Rossouw & Co.); for Respondent: In person.

Ahrens, Member of Court, read the judgment of the Court: This case comes to us in appeal from the Court of the Native Commissioner, Ngotshe District, before whom the plaintiff claimed from the defendant the delivery of one horse, which, the plaintiff states, disappeared from his place of residence and subsequently found in

possession of defendant. Plaintiff also claimed £20, being for use of horse by defendant from May, 1928, to date of summons (30th July, 1929), reckoned at £2 per month and costs of suit.

The Native Commissioner entered judgment for plaintiff for the return of the horse claimed and £3 damages with costs.

The defendant now appeals on the following grounds:

(*a*) That the Native Commissioner came to a wrong conclusion before defendant had an opportunity of calling evidence which had been given in a former case concluded on the 16th April, 1929.

(*b*) That the judgment was against the weight of the evidence and contrary to law.

It appears that the plaintiff had sued the defendant before the Native Commissioner, Ngotshe District, a few months previously for the identical subject-matter as he does now and then the defendant was absolved from the instance, with costs.

In his reasons for judgment the Native Commissioner elected to believe the witnesses for the plaintiff. He states that the defendant did not give his evidence in a satisfactory and convincing manner nor did " some " of his witnesses.

It is true that the record reflects that the defendant closed his case. Of course, the fact should not be lost sight of that the defendant was not represented by counsel in the Court of the Native Commissioner, and it may well be that he was under the impression that once evidence is recorded in the Court that it stood and need not be repeated. It frequently happens that the parties agree in similar instances that the evidence adduced at a previous hearing in the same matter should form part of the record in the subsequent proceedings.

In this case this Court feels that the ends of justice would be met by the matter being referred back to the Native Commissioner for him to reopen the case, to enable both sides to bring further evidence if they so wish.

The appeal is therefore sustained and the judgment of the Native Commissioner set aside, and the case is remitted for trial *de novo*, either party to be afforded every opportunity of calling such further evidence as they may require. The evidence already taken in this case to form part of the record. Costs of this appeal, as well as those in connection with the proceedings before the Native Commissioner to be borne by the unsuccessful party in the action to be brought in the lower court.

1929. *December.* Before E. T. Stubbs, President, H. C. Lugg and F. W. Ahrens, Members of the Court.

Native estate.—Action for distribution of immovable property under a will.—Bond.—Order impossible of performance.—Res judicata.

Facts: An appeal from the Court of the Native Commissioner, Ixopo.

In 1922 judgment was given in the Native High Court directing the present appellant as executor in the estate of one Q to distribute the estate in terms of an agreement which became the judgment of the Court and which was signed by him, the respondent, and other legatees under the will. This judgment was not, however, carried into effect owing to the non-discharge of a mortgage bond over the property.

A fresh action was then instituted before a Native Commissioner for an order against appellant requiring the liquidation of the bond in so far as respondent's share was concerned and its transfer to him. The permission of the bondholder had not been obtained for this arrangement, nor had respondent offered to provide the necessary funds.

The Native Commissioner nevertheless granted the order sought.

At the outset exception was taken to the proceedings on the ground that they were *res judicata,* but this was overruled.

Held: In setting aside the order, that the present action was one and the same as that dealt with before the Native High Court and between the same parties, and that the plea of *res judicata* should therefore have been upheld; and further, that the order was impossible of performance owing to the existence of a mortgage bond over the property, and in regard to which there rested no obligation upon the executor (appellant) to discharge. Respondent was advised to secure the co-operation of the other legatees with a view to securing a discharge of the bond, if the bondholder consented, and then to get the appellant to effect transfer in terms of the judgment before the Native High Court.

For Appellant: Mr. Advocate *Norwood*; for Respondent: Mr. *Macpherson.*

Stubbs, P., delivered the judgment of the Court: A native named Cayijana, otherwise known as Qashana Jalamba, died in 1918 leaving two properties known as Lots BL and BI, in extent 230 and 513 acres, respectively, situate in the District of Ixopo.

Deceased left a will under which the present appellant was appointed executor to administer the estate.

There is a bond over both properties held by Mr. G. E. Francis (since ceded to Mr. Stevens) for £426.

In 1921 a dispute having arisen over the will, an application was made to the Natal Division of the Supreme Court for an order to have the matter tried by the Native High Court in terms of sec. 6 (*b*) of the Courts Act, No. 49, 1898. This was granted. The action was by Jeremiah Tshezi and David Tshezi against the parties to the present appeal and two others.

After some delay the matter came before the Native High Court on the 15th June, 1922, on which date the dispute was settled by a written consent which became the judgment of the Court.

This agreement is headed "Jeremiah and David Tshezi and Impendhle and others," and at the foot bears the signatures of the two attorneys acting for the respective parties. The names of the parties are identical with those cited in the original action before the Supreme Court.

It is significant to note that the copy of the record furnished by the Registrar of the Native High Court, purporting to be the record of the case but which is really the covering jacket of the case, gives the names of the two plaintiffs as Jeremiah Tshezi and David Tshezi, and the defendants as being Impendhle only. This has led to a great deal of confusion and it probably gave rise to the decision of the Native Commissioner in holding that the plea of *res judicata*, which was advanced before him, was not applicable.

A careful examination of the several documents that have been put in shows clearly that the non-inclusion of the rest of the defendants on the jacket was merely an omission. The judgment as recorded was against all the defendants who signed the agreement.

This judgment provided amongst other things for the rendering of an account by the present appellant as executor in the estate; distribution and transfer of the property to the several parties entitled thereto; and the liquidation of the bond by them *pro rata* of their respective shares in the land. It was also agreed that the cost of transfer was to be borne by each transferee.

It is obvious that the action before the Native Commissioner is nothing more nor less than a revival of the original action decided by the Native High Court.

Before him exception was taken to the claim on the grounds that it was *res judicata,* but this he overruled holding that " applicant was only a party to an agreement in terms of which plaintiffs in that case obtained a judgment."

It is difficult to follow this line of reasoning because the judgment was no less a judgment whether obtained by consent or in any other way.

We have no alternative but to sustain this exception, but before concluding we would like to refer to the Native Commissioner's judgment itself. It reads " Order granted as prayed with costs." The order sought reads as follows: " The plaintiff claims an order declaring that he is entitled to transfer by the defendant in his said capacities of the said subdivision C of Lot BL No. 7379 situated in the County of Pietermaritzburg, Province of Natal, in extent eighteen (18) acres subject to payment of his share of the said Bond as at 15th June, 1922, with costs, or for such other or further relief as to the Court may seem fit."

The question naturally arises as to how such an order could possibly be carried out without assailing the rights of the bondholder. It is impossible of performance.

The appeal will be sustained and the judgment of the lower court set aside with costs.

It has been suggested by Mr. *Horwood*, for appellant, and we see no reason to dissent from the view, that one way out of the difficulty would be for all the legatees to act conjointly; approach the bondholder, and if he consents, to tender the amount due on the bond, and then get the appellant to effect transfer of their respective portions.

They have already agreed to pay the costs of transfer under the judgment of the Native High Court.

1929. *December.* Before E. T. Stubbs, President, H. C. Lugg and F. W. Ahrens, Members of the Court.

Marriage by native custom.—Frustrated by abduction and death of intended bride.—Loss of services.—Damages.—Lobolo.—*Defendant in default.—Special notice under section 229 of Code.—Costs.*

Facts: An appeal from the Court of the Native Commissioner, Umzinto. Respondent's daughter was about to be married and the full *lobolo* (ten head and *ngqutu*) had been delivered to him. Shortly before the wedding she was abducted by second appellant and taken to the kraal of first appellant. Repeated representations for her return were unavailing, and eventually respondent was obliged to cancel the wedding and restore the *lobolo*. He then went to work to return seven months later to find that his daughter had died at the kraal of appellants and that they had delivered four head of cattle—presumably as damages—at respondent's kraal.

Respondent now sued for the difference of seven head and also for £18 as damages in respect of loss of service consequent on the death of his daughter. Judgment for the full amount claimed was awarded in the lower court, but the alternative *lobolo* was fixed at £6 per head instead of £4 10s. as required by Government Notice No. 1004/25.

Held: That on the facts disclosed respondent was entitled to damages as it was clear that but for the interference by appellants the marriage would have taken place in which event respondent would have acquired ownership in the *lobolo* cattle delivered to him.

Held: That although no specific damages had been proved in the present case, the claim having been purely an arbitrary one, respondent was nevertheless entitled to some compensation for the loss of his daughter's services as it was a claim that should receive recognition under Native law, more especially under present-day conditions.

Under the special circumstances of the case and with due regard to sec. 181 of the Code, which served as a guide in assessing damages, the judgment of the Commissioner was amended to one

for six head of cattle or their value (£27) and costs, the one appellant paying the other to be absolved.

Both appellants were in default at the trial, although they had twice been served with the summons. This was followed by the issue of a special notice in terms of sec. 229 of the Code, but this notice had been left at their kraal and was not personal as required by the section.

Held: On exception, that the Court was not prepared to interfere as every effort had been made to secure the attendance of the appellants which they had deliberately ignored.

For Appellant: Mr. *Darby*; for Respondent: Mr. *Samuelson*.

Lugg, Member of Court, delivered the judgment of the Court: This case was decided by the Assistant Native Commissioner, Umzinto.

In his statement of claim (supported by himself and two witnesses), respondent avers that his daughter Ungiqondile was about to marry one Mvuni Pungula from whom ten head of cattle and the *ngqutu* had been received as *lobolo*. Preparations were made for the wedding and a trousseau ordered but the marriage fell through and the cattle refunded to Mvuni owing to the girl's elopement with second appellant. (He is the son of first appellant.) Thereafter demand was made to the first appellant by respondent on several occasions for the return of his daughter, and complaint was made to the headman, but without avail. It is even averred that on one of the occasions first appellant threatened respondent with an assegai.

Respondent then went to Durban, leaving his daughter at the kraal of first appellant. When he returned seven months later he found that his daughter had died at the kraal of first appellant and that the latter had meanwhile delivered four head of cattle to the kraal of respondent. The object of this tender has not been disclosed, but apparently it was a sort of solatium for what had happened to respondent's daughter. Respondent refused to accept these cattle and demanded to be paid the full *lobolo* and £18 as damages for the loss of his daughter's services, calculated at £2 a month for nine months.

Actually the claim before the Native Commissioner was for £42, representing six head of cattle and the *ngqutu*, the other four not

being included as they had already been delivered, and the £18 for loss of the daughter's services, or £60 in all.

Respondent was awarded a judgment for the full amount claimed with costs against both appellants, the one paying the other to be absolved.

Both appellants were in default when judgment was given notwithstanding that the summons was served on them personally on two occasions, and finally by the issue of a special notice in terms of sec. 229 of the Natal Native Code; but in regard to the latter there was no personal service as required by the section, the notice being merely left at their kraal.

Mr. *Darby* has taken exception to the proceedings on the ground that there was no personal service, but we are not prepared to interfere in view of the repeated efforts to secure the attendance of the two appellants and their apparent defiant attitude in not attending.

The main grounds of appeal are that the claim for *lobolo* was too remote and that no special damages had been proved in respect of loss of services.

It is clear that the girl was induced to leave her home on the eve of her wedding at the instigation of the two appellants. They are, therefore, to blame and in this connection reference might be made to secs. 73, 214 and 211 of the Code; also the case of *Simaki* v. *Sisimana* (18 N.L.R. 56).

Sec. 202 of the Code provides that no specific sum need necessarily be claimed, the Court being left to fix the amount; and in fixing the award to be made in this case we have been guided to a certain extent by sec. 181 of the Code.

This section provides that where a womna dies within a year of her marriage and having no issue the husband may recover a portion of the *lobolo*, but not exceeding three-fourths of the original number or value paid on her.

Had the girl married Mvuni, as she undoubtedly would have done but for the interference of the two appellants, respondent would have acquired ownership over the eleven head of cattle which had been delivered to him on account of her *lobolo* but which he had been obliged to refund on the marriage falling through.

Had she then died, as she did a few months after the date of the marriage had been fixed, the husband would have been entitled to recover about three-fourths of the *lobolo*, leaving three or four head with respondent.

No evidence has been led to show how the £18 claimed for loss of services has been arrived at. It is supported by a bald statement and is merely arbitrary.

Mr. *Darby* contends that such a claim would not be recognised under Native law, but we do not share this view, and Mr. *Samuelson* has rightly pointed out that some amount of damages should be recognised under this head as it is a recognised practice for Natives to receive some sort of payment for services rendered by their children to other Natives. Present-day conditions certainly support the view.

The monetary value of a *lobolo* beast has been fixed at £4 10s. by Government Notice No. 1004/1925 of the 19th June, 1925, and the Native Commissioner was certainly wrong in basing his award at the rate of £6 per head. He appears also to have been somewhat confused and altered his judgment several times, resulting in the present appeal and unnecessary expense to the parties.

The conduct of the two appellants certainly entitles respondent to some measure of damages, and in view of what has already been stated, especially in regard to secs. 202 and 181, we have come to the conclusion that he is entitled to six head of cattle or their equivalent, £27.

The appeal will therefore be sustained in part, the judgment of the Native Commissioner being altered to read " For plaintiff for six head of cattle or their equivalent value, £27, and costs, the one defendant paying the other to be absolved."

As the appellants have succeeded to a substantial extent they will be entitled to the costs of this appeal.

MXOVI GWALA v. QATSHANA TSHEZI.

1929. *December.* Before E. T. Stubbs, President, H. C. Lugg and F. W. Ahrens, Members of the Court.

Defamation.—Complaint to chief.—Privilege.—Section 203 of Natal Native Code.

Facts: An appeal from the decision of the Native Commissioner at New Hanover. Where at an enquiry before a chief, defendant, in answer to a charge of assault, stated that he had committed the

act because of having found plaintiff in an act of adultery with a native woman, and where as the result of subsequent proceedings the chief had awarded plaintiff £3 damages on the ground that it was a false and defamatory statement.

Held: In sustaining the judgment of the Native Commissioner, upholding that of the chief, that defendant was not protected by the proviso to sec. 203 of the Code as it had been clearly established that his statement was false, and had been fabricated in order to justify the assault.

For Appellant: Mr. *Marwick*; for Respondent: Mr. *Howe*.

Lugg, Member of Court: This appeal involves a claim for damages founded on a defamatory statement alleged to have been made by appellant and his companion before Chief Swaimana of the New Hanover District during the course of an enquiry held by the chief into a charge of alleged assault on respondent.

Respondent complained of having been assaulted by appellant and his companion Tshanibezwe, and on being asked by the chief why he had committed the assault, appellant stated that it was because they had found respondent in the act of committing adultery with a woman named Mandhlela, the wife of Nkani. It is common cause that such a statement was made at the enquiry. Tshanibezwe was not present at the enquiry. He belongs to a different tribe.

Thereafter respondent sued appellant for £7 damages alleging that the statement was false, and that the assault made upon him was quite unprovoked. He was awarded a judgment for £3 and costs by the chief.

The matter then went in appeal to the Native Commissioner, New Hanover, and he confirmed the judgment with costs.

The matter now comes to us on appeal on two grounds, viz.:

(*a*) That the lower court wrongly allowed plaintiff to call the evidence of one Mahlangeni Camu in rebuttal, seeing that the plaintiff in cross-examination denied that defendant had come to him with Tshanibezwe in the presence of the said Mahlangeni Camu and others.

(*b*) That the statements made before the chief were privileged.

One of the provisos of sec. 203 of the Natal Native Code lays down "that no action for defamation will lie if the words used were addressed to any person in authority with reference to the

plaintiff or complainant, in good faith, and not with express malice '' and before the second ground of appeal can be answered it will be necessary to carefully analyse the evidence to ascertain whether the Native Commissioner was correct in his finding on the facts—whether or no the allegation of adultery was untrue and maliciously made.

The Native Commissioner has found that the assault was entirely unprovoked and that the story of adultery was merely a concoction to justify the assault. If this was, in fact, the case, then unquestionably an action for damages would lie.

Appellant and his companion Tshanibezwe attended a wedding at the kraal of one Mzamane Gwala. Respondent and the woman Mandhlela were also there.

Appellant and Tshanibezwe state that they left for home about 9 p.m. and had only proceeded about thirty paces from the kraal when they came upon respondent and the woman committing adultery near the footpath. They immediately assaulted him, inflicting two wounds on the head and drove him away. Appellant then returned to Mzamane's kraal but did not report the matter to the kraal head or to the woman's husband.

Mandhlela, a witness called by respondent, states that the woman and her husband left the wedding together between 7 and 8 p.m. and slept at a kraal across the Umgeni. The woman herself and her husband both tell the same story.

The husband gives his wife a very good character. He has been married to her since 1897. Her youngest child approximates the age of respondent. He knows respondent well and repudiates the idea of immoral relations existing between him and his wife. He has never had occasion to suspect his wife of misconduct.

Masingana Ngobese also states that the woman and her husband left the wedding together just after dark. Nzama Vudima also accompanied the two to the kraal of Bunyula where they slept.

Sikwayimana Vudima, a witness for the defence, also states that these people left together but differs in regard to the hour of departure. He says they left at 1 a.m. and not shortly after dark. He is supported by Soudota Zondi (page 14). He saw respondent drinking beer at the wedding late that night.

The witness Mahlangeni was called by respondent with regard to the allegations made that the latter had offered to sell a beast and to pay this witness and his two assailants 5s. each not to

divulge that they had found respondent committing adultery with the woman. This witness denies that such an admission was ever made and asserts, on the contrary, that respondent showed fight when reference was made to the assault of the previous evening. The evidence of this witness is of considerable importance because he was originally subpoenaed by appellant, but for some unknown reason was not called by him.

Exception was taken to the evidence of this witness, called in rebuttal, but as the record stands there is nothing to indicate from the cross-examination of respondent and his witnesses that such an admission was being relied upon. The nearest we get to it is a denial by respondent of having met appellant and others the morning after the assault.

If such an admission was made it was certainly a very important point and one would naturally expect it to have been made the subject of a searching cross-examination, but the significance of this alleged meeting was not disclosed until after the defence opened.

To my mind such procedure was in the nature of a surprise, and I certainly think that the Native Commissioner was right in admitting the evidence to rebut such an allegation.

In this connection it might be pointed out that a magistrate may call a witness at any stage of the proceedings in non-native cases; and in criminal cases it has been held in the case of *Rex* v. *Hepworth* (1928, A.D. 265) that a magistrate can do the same in the course of a criminal trial. It follows that the Native Commissioner could have done so in the present case, and I therefore see no reason for interfering.

Mr. *Marwick* has endeavoured to make a good deal out of the fact that respondent did not complain to anyone of having been assaulted, but all we can say in answer to this contention is that the Record is silent on the point. He does not appear to have been questioned on the matter by anyone, and it is very probable, in view of the support he receives from the several witnesses, that he did complain.

On the other hand the appellant and his companion Tshanibezwe were equally remiss in not reporting what they had found and done that evening to the kraal head. They allege that respondent and the woman were found committing adultery within 30 paces of the kraal; and it so shocked them, apparently, that they found it

necessary to commit an assault, yet they did not report the matter to the kraal head of the kraal in which it occurred, or to the woman's husband. Their excuse is that they refrained from doing so because the woman pleaded with them to keep quiet. I am unable to believe such a statement.

I am not satisfied in the first place that the assault was committed within the precincts of the kraal but some distance from it, otherwise it seems improbable that none of the natives at the gathering would have heard the disturbance. It was a moonlight night.

It has also been sought to show that respondent deliberately concealed the fact of having been assaulted and covered his head in a cloth to hide his wounds because of the compromising situation in which he had been found. As against this we are asked to believe that the next morning he made an admission to a number of people and actually made an offer to some of 5s. each to keep quiet.

The woman is given an excellent character by her husband; he knows respondent well, and scorns the idea that immoral relations could have existed between them.

After having given careful consideration to the case I find no reason to differ from the finding of the Native Commissioner.

The appeal should be dismissed with costs.

AHRENS, Member of Court: The Native Commissioner came to the conclusion that the story of the adultery was a fabrication designed to escape the consequences of an unprovoked assault. Certain circumstances impel me to agree with him. *Inter alia*, the fact that Mxovi kept the assault dark is to my mind more consistent with guilt than innocence, whereas the fact that Qatshana laid a charge of assault against Mxovi is to my mind more consistent with innocence than guilt.

In sec. 203 of the Code it is provided that no action for defamation will lie, if the words used were addressed to any person in authority, with reference to the plaintiff or complainant, in good faith, and not with express malice.

In this matter there seems to be express malice shown. The defendant deliberately assailed the character of the plaintiff by making a statement with an *animus injuriandi*, which statement he knew to be false, thereby abusing his privilege.

STUBBS, P.: The learned Members of the Court have reviewed the evidence and have expressed their views on the legal aspects of the case. It remains only for me to refer to one or two legal points in their bearing on the facts as I find them.

It is not clear from the Record whether the Native Commissioner dealt with this matter at Common law or under Native law. It was taken on appeal to his Court from the Native chief's decision and as the Native chief must have dealt with it in accordance with Native law, it is assumed that the Native Commissioner essayed to do the same, although it is somewhat difficult to determine as, in his reasons for judgment, he relies mainly on Common law authorities and merely makes a passing reference to sec. 203 of the Code to which reference has been made by the Members LUGG and AHRENS.

The Native Commissioner under sec. 11 (1) of Act 38 of 1927 has a discretion in all suits or proceedings between Natives involving questions of customs followed by Natives to decide such questions according to Native law applying to such customs. He may elect to decide any question at Common law or Native law, but the discretion thus given must be exercised judicially. There should be a logical reason for eschewing Native law in a matter essentially involving principles of that law in favour of the Common law. Where Native law provides the remedy, as is the case in the matter before us, Native law should be applied with no fusion or confusion of Common law as has occurred in this case. Copious reference has been made by both counsel and the court below to Common law authorities and, as I have said, merely a cryptic and pointless reference is made to the section of the Code which expressly covers the main point in issue, which is calculated to lead to a somewhat confused legal position for what might be thought slander by Europeans might not always be considerad defamatory by Natives.

The Code, sec. 203, reads: "No action for defamation will lie if the words used were addressed to any person in authority with reference to the plaintiff or complainant in good faith and not with express malice," and it is for us to say whether the court below rightly found on the fact that the allegation of adultery was false and maliciously made. On the common law aspects, as they bulked large in the findings of the Native Commissioner, a passing reference might be made, then conclusions arrived at on the law as laid down in the Code.

To say of a man: " I found him in the act of adultery with so and so " is *per se* defamatory. In this case the words complained of were uttered by the appellant in the course of his evidence and on an occasion when the chief was adjudicating in an action for damages for assault brought against the appellant by the respondent. The appellant made use of the words in answer to a question by the chief: " why he had committed the assault," and he sought to justify the assault by stating that he had caught the respondent with the woman Mandhlela, the wife of Nkani, in *flagrante delicto*, which provoked him to the assault. If the words were true and uttered in good faith, appellant would be entitled to the protection of the privileged occasion in accordance with the purpose for which the occasion arose.

The evidence leaves no doubt in my mind that there is not the slightest truth in the statement that appellant found respondent committing the act of adultery. In the Chief's Court he sets up the bogus charge to escape the consequences of an unprovoked assault on respondent in circumstances which lead me to believe that it was a night of beer-drinking and revelry and influences were abroad which led appellant to do things which, in his more sober senses, he probably would not have done. I think it has been shown that appellant was actuated by express malice; that the words spoken were false and that the appellant in giving utterance to them had no reasonable grounds for believing they were true. Nathan, *Law of Torts*, states: " The subject may be thus summarised: In an action for slander or words used by the defendant when under examination as a witness in judicial proceedings the *onus probandi* is on the plaintiff to show the *animus injuriandi* of the witness and the absence of reasonable cause for believing the truth of the words."

The evidence in this case satisfactorily proves that the appellant with the motive of escaping punishment for the assault committed by him upon respondent has stated as true that which he knew to be untrue. He knew there was no truth in the statement he made to the chief. He knew it was a damaging statement to make. Adultery by sec. 277 of the Code is an offence against decency and morals and under sec. 209 any Native committing adultery with a married woman living with her husband shall, irrespective of any criminal liability, be liable in civil damages to the injured husband. So that, whether principles of Native law

as laid down in the Code or the Common law are applied, we arrive at the conclusion that the Native Commissioner, in the circumstances, was justified in coming to the decision that appellant was liable. The appeal is therefore dismissed with costs.

The chief gave judgment in favour of plaintiff for £3 and costs. For some inexplicable reason the Native Commissioner states the judgment was given for £7 (see reasons for judgment).

The judgment of the court below is altered to read: Appeal dismissed with costs and the judgment of the chief in favour of plaintiff for £3 sustained.

NGQOZOMELA MADONSELA v. MAKOPELA MNGUNI.

1929. *December.* Before E. T. Stubbs, President, H. C. Lugg and F. W. Ahrens, Members of the Court.

Plea of res judicata *against appeal from Native Chief's Court.—Damages for assault.—Circumstances in case not disclosed in the record.*—Onus *of proof.—Costs.*

Facts: An appeal against the judgment of the Native Commissioner at Helpmakaar. Where the Native Commissioner dismissed an appeal against the decision of a chief who awarded damages for an alleged assault, and where the summons did not disclose whether the proceedings before the Native Commissioner were in the nature of an appeal from the chief or whether the case was tried *de novo* by the Commissioner and where the plea was brought that certain circumstances in connection with the case in the court below were not disclosed, and where appellant in answer to the claim stated that he was not at the scene of the assault as alleged but was elsewhere at the time.

Held: That it was necessary in a summons commencing an action, where an appeal is being heard by a Native Commissioner from a decision of a Native Chief's Court to set out that it is an appeal, otherwise there would be nothing to prevent a respondent setting up the objection of *res judicata.*

Held, further: That the Court is only concerned with the facts that appear on the record, and must decide the issue on those facts only.

Held, further: That as the *onus* was on appellant to prove his claim, and as he could have called his witnesses to discharge the *onus*, but failed, the appeal must be dismissed with costs.

For Appellant: Mr. *Shepstone;* for Respondent: Mr. *McSwaine.*

Stubbs, P.: This is an appeal from the judgment of the Native Commissioner, Helpmakaar, who dismissed an appeal to his Court from the decision of Chief Bande, who awarded the respondent £5 damages for an alleged assault committed upon him by appellant.

Mr. *Shepstone* has raised the point that the form of the summons does not comply with the rules. The form of procedure adopted in this case, while a little crude, cannot be regarded as irregular or of such character as to vitiate the proceedings. It is necessary in a summons commencing an action, where an appeal is being heard by a Native Commissioner from a decision of a Native Chief's Court, to set out that it is an appeal, otherwise, unless there is some clear indication that the proceedings are in the nature of an appeal, there would be nothing to prevent the respondent setting up the plea of *res judicata.*

Mr. *Shepstone* has raised the further point that the chief dealt with the case, not as a civil one, but as a criminal proceeding, and he seeks to substantiate this contention by the note comprising exhibit "A". I cannot, however, agree with this view. The evidence and the record itself satisfy me that the Chief set out to and did actually treat the matter as a civil action for damages arising out of the assault.

On the merits, the evidence of the respondent (Plaintiff in the court below) is that the appellant (Defendant in the lower court), struck him twice on the head with a stick. One Manxiweni interfered and separated them. Respondent fell to the ground and was assisted home by Zika and Mpika. Mpika corroborates, and says that he saw appellant at the scene of the assault and saw him participate. He and others then fled, but he returned later to the spot where he had last seen respondent and there found him lying on the ground very weak. He was assisting him away when the appellant and others returned to renew the attack, but by this time he and his associates had succeeded in hiding respondent in a mealie field.

Ditsholi deposes to similar facts.

Appellant in answer to the claim states that he was not at the scene of the assault as alleged but was elsewhere at the time. The *onus* was on him to prove this. It is perfectly clear, from his own showing, that he could have called witnesses to discharge the *onus*. He has failed to do so. For these reasons I do not think the Native Commissioner's decision should be disturbed.

Mr. *Shepstone* has hinted in the course of his argument that there are certain undisclosed circumstances, but we are only concerned with the facts that appear on the record, and must decide the issue on those facts.

The appeal is dismissed with costs.

MARTIN, Member of Court: In concurring with the learned President's judgment, I wish merely to refer to certain aspects of the evidence in support of the view that the story of the respondent should be accepted in preference to that of the appellant.

The respondent is emphatic in his identification of his assailant. He declares that it was not dark when the assault took place, and there is no reason, in the absence of evidence to the contrary, why he should not be believed. There is ample corroborative evidence that the appellant was the chief actor in the assault.

AHRENS, Member of Court: Whilst otherwise agreeing with the learned President and my brother MARTIN, I differ in regard to the merits of the case.

The evidence of the respondent goes to show that he was attacked by a party of Natives. He states that appellant was the first to attack him and that he (appellant) struck him with a stick on his head and drew blood. The others, he says, also attacked him. Then Manxiweni came to separate them, appellant and others left him. Eventually Zika, his brother, and Mpika helped him home, but when appellant and other Natives came back again they (Zika and Mpika) abandoned him in a mealie field and fled.

Plaintiff (Respondent) called two witnesses, namely, Mpika and Ditsholi, both of whom did not see the alleged assault by appellant committed. The former states that when they went home that night appellant and others threw stones at them and they ran away leaving the respondent in the spruit. He does not explain why the respondent got left behind. Ditsholi, his other witness, testifies that they left Majola's kraal at twilight, and when they passed appellant and other natives they were chased by them

as far as the spruit. He assisted in carrying respondent to a mealie field. The Record does not disclose whether Ditsholi and Zika are one and the same person. Respondent stated that it was Zika and Mpika who helped him, but he makes no mention of Ditsholi. It is strange that neither the plaintiff nor his witnesses recognised any other person or persons of the attacking party apart from the appellant. Surely, if it was possible for the plaintiff to recognise the defendant that night, he could have identified one or other of his assailants apart from the appellant. It is also strange that neither of his witnesses makes reference to any wound or wounds on respondent's head.

To my mind Manxiweni's evidence would have tended to throw considerable light on the matter. It was he who, according to respondent's own statement, separated respondent, appellant and others after the alleged assault. It is, therefore, not understood why he was not called.

Ei incumbit probatio qui dicit, non qui negat, that is, the issue must be proved by the party who states an affirmative.

The law will not presume the commission of a crime or tort, the party alleging the commission of an act amounting thereto must prove it.

I think, therefore, the respondent has not discharged the *onus* resting upon him in this case.

NOMGCANEKISO KUMALO v. PETWANE KUBHEKA.

1929. *December* 10. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Absence of service of summons. Section 229 *of Native Code.—Status of woman as interested party.—Question of* locus standi. *—Powers of Native Appeal Court under section* 15 *of Act* 38, 1927.—*Irregularity of proceedings in lower court.—Costs.*

FACTS: An appeal from the decision of the Native Commissioner at Estcourt. In the court below plaintiff claimed from defendant four head of cattle and £4 for *lobolo.* Defendant was a minor whose whereabouts were unknown to plaintiff. Summons was served on his guardian, who admitted that defendant was liable.

Defendant's mother intervened as the cattle were in her possession. Judgment was given against defendant for the four head of cattle, but absolution was granted as regards the claim for £4. The woman was declared to have no *locus standi*. Against this decision defendant's mother appealed.

Held: That the judgment in the court below was bad *ab origine* for want of proper service of the summons, that sec. 229 of the Code is emphatic in its terms, and should have been complied with as far as Natal proper was concerned, and that by virtue of the powers bestowed on the Court of Appeal by sec. 15 of Act 38, 1927, the whole of the proceedings in the court below should be quashed.

Held, further: That as the appellant was a woman she could not in the circumstances disclosed, be recognised as party in the action.

Held, further: That as the respondent set the law in motion and was responsible for the irregularly which occurred in respect of service and which resulted in a bad judgment being given, costs in the lower court were awarded against him.

For Appellant: Mr. *Darby*; for Respondent: Mr. *Clark*.

Stubbs, P., delivered the judgment of the Court: Respondent sued one Swelimpahla Kumalo for four head of cattle and £4 and obtained a judgment for four head.

Swelimpahla is a minor, and his present whereabouts are not known except that he is in Johannesburg.

The summons was served on his guardian, but no special notice was issued as is required by sec. 229 of the Native Code.

At the trial the guardian appeared and admitted that the defendant, Swelimpahla, was liable for the greater portion of the claim.

At this stage Swelimpahla's mother, the present appellant, was allowed to intervene as an interested party because the cattle involved were in her possession.

The Native Commissioner awarded the present respondent a judgment for four head of cattle, but granted absolution in respect of the £4. At the same time he held that the woman had no *locus standi* to intervene.

On the point of her status we entirely agree, but we find it impossible to uphold the judgment because of the absence of service as required by sec. 229 of the Code.

We have already had occasion to deal at length with this section in its relation to the Native Administration Act and the rules

of court framed thereunder in the case of *Simon Ngcobo and Bernard* v. *Steshi Ngcobo* (N.A.C. (T. & N.) 1929). The section is emphatic in its terms and must be complied with in so far as Natal proper is concerned; and as there was no such compliance in the present case we have no alternative but to hold that the judgment in the court below was bad *ab origine* for want of proper service.

The Native Commissioner having found that the woman had no *locus standi*, he should not have allowed her to intervene; and for the same reason we cannot recognise her as appellant in the present proceedings.

In so far, therefore, as she is personally concerned, we have no alternative but to dismiss the appeal with costs in both Courts; but having found that the judgment of the lower court was bad *ab origine* we find it necessary to exercise the powers conferred on us by sec. 15 of the Native Administration Act and to quash the whole of the proceedings before that Court.

As the present respondent set the law in motion before that Court and was responsible for the irregularity which occurred in respect of service, and which resulted in a bad judgment being given, the costs are awarded against him in the lower court.

The order of this Court will, therefore, take the following form: —

That the appeal be and the same is hereby dismissed with costs, but the judgment of the Native Commissioner is set aside with costs in favour of the defendant before his Court.

It might be added that this ruling met with the approval and acceptance of counsel for both parties before us.

1929. *December* 11. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Practice.—Service of summons in native cases.—Section 229 *of Law* 19, 1891 (*N.*).—*Special notice on defendant.—Clause* 26 (b) *of the rules in the Courts of Native Commissioners.—Native Administration Act and the Natal Native Code.*

FACTS: Appeal from the decision of the Native Commissioner at Ixopo. Appellants claimed £260 in the court below being an amount of £160 paid for the purchase of a motor-bus, and £100 damages suffered in that the terms of the contract were not fulfilled. When the case was first called on by the Native Commissioner, 1st appellant was present, but his witnesses were absent. 2nd appellant was in default. The case was then adjourned to a fixed date, and the notes record that 1st appellant was warned to subpoena all his witnesses otherwise the trial would proceed without him. At the resumption, 1st appellant was in default, notwithstanding the warning, but 2nd appellant was present. The trial then proceeded in the absence of the former. Exception was taken on the grounds that the judgment against the 1st appellant was bad inasmuch as sec. 229 of the Code was not observed, and that Clause 26 (*b*) of the Rules for the Courts of Native Commissioners was *ultra vires* of that section.

HELD: That the Native Code and its amendments were still in force, having been entrenched by sec. 24 of the Native Administration Act, and had not been impliedly repealed by sec. 36 of the latter enactment; and that consequently Clause 26 (*b*) of the rules in the Courts of Native Commissioners was *ultra vires* the Native Administration Act and sec. 229 of the Code as amended by Act 13, 1894 (N.).

HELD: That it was necessary in all cases that where a defendant had failed to answer the summons commencing the action that he be served with a special notice as required by sec. 229 of the Code.

HELD: That in the present case the service of such special notice was not necessary as the defendant had appeared before the Native Commissioner when the case was opened and had been personally warned by the Court to attend with his witnesses on the adjourned date. His failure to do so entitled the Court to proceed with the trial and to pronounce judgment in his absence.

For Appellants: Mr. *Darby;* for Respondents: Mr. *K. L. Macpherson.*

Stubbs, P.: Plaintiff was awarded £160 and interest at 6 per cent. from February 9th, 1926, costs against both defendants one paying the other to be absolved.

Defendants have appealed against the judgment.

Plaintiff's claim is based on the ground that the defendants were his agents for the purchase of a motor-car on his behalf which they were to employ for commercial purposes as a taxi and run for his benefit; that he furnished them with an amount of £160 which was to be utilized for the purpose of acquiring the car; that contrary to his mandate they acquired in their own names a car on the hire-purchase system. A copy of this hire-purchase contract forms part of the record in this case and from such contract it appears that the car, a Dodge motor-bus, was acquired for £316 15s. in the name of both defendants on the condition that £100 was to be paid on the signing of the agreement on the 9th February, 1926, and the balance by monthly instalments of £20.

Plaintiff was absent at the time. Subsequently, about August, 1926, the car was taken back by the sellers in terms of the agreement owing to default in payment of the monthly instalments. Plaintiff demanded a statement of account from defendants which they have failed to furnish.

Defendant No. 2 was in default when the case was originally called on the 11th June, 1929. When the case again came before the Court on the 27th July, 1929, No. 1 defendant was in default. Defendant No. 2's plea is that he does not know plaintiff in the transaction; that the car was purchased by a Syndicate of four persons including plaintiff and that he, defendant No. 2, was requested by No. 1 defendant to join the Syndicate which he did and as his share contributed £20.

The Native Commissioner gave judgment as above.

From the evidence it is necessary to inquire whether the plaintiff has established the following facts:—

A. Were the defendants his duly appointed agents: on this point there is the evidence of the plaintiff to the effect that before leaving for Koffiefontein he asked No. 2 defendant to select a car for him and report the result to him. His evidence here is corroborated by Johanna. As he heard nothing further, he instructed

defendant No. 1 to see what the former was doing in the matter. Later he received word from the defendants that they had found a suitable car. At the same time he admits that the letter containing this information was from No. 1 defendant. There is also the evidence that defendant No. 2 wrote to plaintiff demanding his wages for driving the car, Exhibit " B ". This demand does not tally with defendant's contention that he was co-owner. Upon plaintiff's return he was not satisfied with the course of things and had an interview with both defendants. At this interview witnesses Johanna and Gulube were present, and both state that the two defendants never questioned plaintiff's ownership in the car, on the contrary they admitted it was his property.

This evidence, I think, should be accepted in preference to that of defendant No. 2 which stands alone Moreover it is significant that he allowed plaintiff to have all the say and accepted dismissal as driver of the car from him when the latter found him unsatisfactory—an implied recognition of plaintiff as principal.

Apart from whether the evidence for plaintiff alone is conclusive to the effect that the defendants were expressly appointed, the actions and conduct of the defendants imply appointment and are therefore corroborative of plaintiff's contention.

B. The second point is, what proof is there as to the amount handled by the defendants on behalf of plaintiff? Plaintiff was away when he was advised that defendants had decided upon a suitable car. He says he had £100 which was in possession of Ntshintsha. This is corroborated by the latter. £20 was borrowed from Nginga on plaintiff's behalf by defendant No. 1 This is sustained by Ntshintsha who says he saw the money handed to Simon, No. 1 defendant. There is a discrepancy in Johanna's evidence regarding this £20. He says that he was present when plaintiff borrowed the £20 from Nginga and that plaintiff told Nginga to hand it to Ntshintsha. I cannot see how this could be possible as Johanna was away with plaintiff at Koffiefontein when the money was alleged to have been paid. A further £20 was borrowed by plaintiff from Johanna. Plaintiff says a third £20 was borrowed from one Ntsila. Ntsila is dead and there is no evidence other than plaintiff's on this transaction. Ntsila did not accompany plaintiff to Koffiefontein and he does not explain how or where he borrowed this money. I can find no evidence that Ntsila lent him the £20 other than the plaintiff's word.

The alleged total of £160, made up of the £100 and the three separate amounts of £20 were given to Ntsila. The question arises: what did he do with the £160? The witness Masigwagi, mother of Ntsila, says that he took the £160 and accompanied by the two defendants went to Durban to buy the car. Ntshintsha says, " £160 was taken by Ntsila to Durban to pay for the car . . . ." As to what eventually happened to the £160 there is no evidence. According to the deed of agreement, drawn up and signed by the sellers of the car and the two defendants, only £100 was paid on account of the purchase price. Ntsila was undoubtedly plaintiff's agent in handling this money and the question arises, has the plaintiff discharged the *onus* which rests on him and proved that the £160 was actually paid over? I think not, otherwise the amount would have been credited in the deed of agreement. Defendant No. 2 says he contributed £20 towards the £100 but I cannot place any credence in his evidence in view of his actions throughout. Furthermore everything must be presumed against the defendants.

To me it would appear that only £100 was paid on account of plaintiff by his agent Ntsila.

C. Having decided that the defendants were plaintiff's agents, and that the amount of £100 was paid on his behalf, it remains to decide whether the agents performed their duty with that diligence (*Exactissima dilegentia*) which the nature of their duty demanded. It has been held that in all matters left to the discretion of an agent it is his duty to act in the utmost good faith and to the best of his judgment solely for the benefit of the principal and that in carrying out the business entrusted to him he will be liable in damages for any loss occasional to his principal even slight negligence on his part even though he may have undertaken to do the work for nothing. In the present action the defendants, in abuse of their position and contrary to their mandate, purchased the motor car on their own behalf under an agreement unknown to the plaintiff and further neglected to advise him of the exigencies of that agreement. It is true that the principal became aware of the conditions of the agreement and the danger of his position before the sellers resumed possession but this can in no way excuse the lack of good faith and diligence on the part of his agents. Further the agents neglected upon the plaintiff's demand to render an account of their dealings, and moneys received in connection

with the transaction and the running of the motor car as a taxi. This it was their bounden duty to do—see *Bank of Africa Ltd.* v. *Giles* (25 S.C. 11) and *Swinton* v. *Board of Executors* (16 C.T.R. 1910).

D. *Damage sustained.*

The measure of damages for negligence or any other breach of duty by an agent in the course of the agency is the loss actually sustained by the principal being such loss as in the ordinary course of things would naturally result, or such as, under the particular circumstances the agent might reasonably have expected to result from such negligence or breach of duty. In the present instant such damage has, in my opinion, been proved to be £100 being the amount actually proved to have been paid on account of the purchase price of the car.

The defendants were joint agents and as such each is liable in solidum, one paying the other to be absolved.

The Native Commissioner was, apparently, in view of sec. 221 of the Code, wrong in awarding interest.

The appeal is allowed to the extent of £60 with costs and the judgment of the court below is altered to one for plaintiff for £100 with costs, the one paying the other to be absolved.

In view of the argument of counsel for appellant, we have considered the question of altering the judgment of the Native Commissioner to one of absolution from the instance. This would have the effect of reopening the whole case and having regard to the fact that we are satisfied that the respondent has established his claim to at least £100 and that the conduct of the appellants has been very questionable throughout, we consider that no useful purpose would be served by making such an order.

Ahrens, Member of Court: I concur.

Lugg, Member of the Court: I concur. We are now called upon to consider the points raised in grounds B. and C. of the writ of appeal.

When this case was first called on by the Native Commissioner first appellant was present, but his witnesses were absent. Second appellant was in default. The case was then adjourned to a fixed date (26th July, 1929), and the notes record that first appellant was warned to subpœna all his witnesses otherwise the trial would

proceed without him. At the resumption first appellant was in default notwithstanding the warning, but second appellant was present. The trial then proceeded in the absence of the former.

Exception is taken to B. and C. of the writ on the grounds that the judgment against first appellant was bad inasmuch as sec. 229 of the Code was not observed, and that clause 26 (*b*) of the rules for the courts of Native Commissioners was *ultra vires* that section.

Sec. 229 of Law 19, 1891 (N.), reads:—

> " No judgment in the nature of a provisional sentence shall be given by any court by reason of the defendant's absence or otherwise. Should the defendant fail to attend in answer to the summons in the action, the Court shall order issue of a special notice upon him in person, directing his attendance under penalty for contempt, and intimating that judgment may be recorded against him should he still fail to appear."

This section was amended by sec. 6 of Act 13, 1894 (N.), which reads—

> " When a defendant to whom a special notice has been directed under sec. 229 of Law 19, 1891 (N.), cannot be found in Natal such notice may for all purposes be served at his last known place of residence in the Colony."

The whole object of these two sections was to ensure natives receiving proper notice of trial, and of providing the procedure to be followed where defendants could not be found.

I take the words " provisional sentence shall (not) be given by any court " to mean that the usual form of default judgment granted in non-native cases could not be given in native cases until a special notice had been served in terms of the section.

We have to decide therefore whether the man received a proper notice, and it seems to me that he did. The warning he received from the Court was a far more effective warning than one contained in a special notice, and he cannot now complain that judgment was given in his absence. The Native Commissioner was in order in dealing with the matter as he did.

Sec. 26 (*b*) of the new rules introduces a form of procedure hitherto not followed in Native cases in Natal, and is altogether silent as to the procedure to be followed where a defendant cannot be found. Under it default judgments may be given, and clause

30 (1) provides for the rescission of such judgments on good cause shown. This is an innovation in so far as native cases in Natal are concerned.

The question naturally arises as to whether these clauses can override the Code?

Sec. 24 of the Native Administration Act lays down:—

"Notwithstanding anything to the contrary in Natal Law No. 19, 1891 (N.), the Governor-General may from time to time, by proclamation in the *Gazette*, amend the provisions of the Natal Code of Native law which code or any amendments thereof shall remain of full force and effect except in so far as amended under the provisions of this section: Provided that no such proclamation shall have any force or effect until one month has elapsed from the date of its promulgation in the *Gazette*."

But if we turn to sec. 36 of the same Act we find "that the laws mentioned in the Schedule to this Act, and so much of any other law as may be repugnant to or inconsistent with the provisions of this Act, are hereby repealed."

At first glance they would appear to be in conflict, but closer examination will show that sec. 24 is specific in its terms, and has the effect of entrenching the Code from any modification except by proclamation by the Governor-General, whilst sec. 36 merely repeals sec. 2 of the Code and such other laws as may be repugnant or inconsistent with it, leaving the rest of the measure intact.

It seems perfectly clear then that the object of the Native Administration Act was to preserve the Code intact (except as specially provided under sec. 24), and it follows as a matter of course that any rules or regulations published under it would be *ultra vires* the Act if in conflict with the Code and its amendments as the rule under notice undoubtedly is.

The rules regulating the practice and procedure hitherto in operation in Natal were framed under sec. 71 of Act 49, 1898, but sec. 71 and the machinery established under it was swept away by repeal by the Native Administration Act and the present rules substituted. Where the latter conflict with any section of the Code they must be regarded as being *ultra vires*. The old rules, be it noted, conformed to sec. 229 of the Code by providing for the issue of a special notice.

For these reasons I am of opinion that clause 26 (*b*) is *ultra vires* the Native Administration Act, but as has already been pointed

out this ruling cannot affect the position in so far as the first appellant is concerned because of the warning he received from the Court.

The effect of this ruling will be found to be far reaching because it will be found that in several instances the Native Administration Act is in conflict with the Natal Native Code, and the only remedy seems to be to either amend the latter by proclamation to conform to the former or to amend the Act itself.

As the Natal Native Code only applies to Natal proper and not to Zululand, it should be made clear that the above remarks only apply to Natal and not to the latter.

In coming to the above conclusions we have found it necessary to draw attention to the case of *Pangindawo Hlungwane* v. *Mabozo Mapumulo* (N.A.C. (T. & N.) 1929), dealt with early this year, in the course of which it was postulated that certain portions of the Code had been impliedly repealed by the Native Administration Act, and that attorneys and others were barred from appearing in *lobolo* cases by Act 7, 1910, an amendment of the Code.

It follows, as is laid down in that Act, that actions for *lobolo* cannot be brought in appeal before this Court, nor can advocates and attorneys appear in such cases.

JIM NSELE v. NDABAMBI SIKAKANE.

1929. *December* 12. Before STUBBS, President, LUGG and AHRENS, Members of the Court.

Native de facto *marriages, Zululand.—Application of the* 1878 *Code. Official witness.—Sec.* 16 *of Code of* 1878.— Lobolo.— Sisa *cattle.*

Appeal from the Native Commissioner's Court at Melmoth, Entonjaneni District.

Appellant, a native teacher, seduced one of his pupils and then made reparation by paying the usual damages to her father. Thereafter he tendered *lobolo* and opened negotiations for the marriage. At the same time he was warned by the magistrate against further cohabitation with the girl. A child was born as the result of the seduction.

The girl remained for some considerable time at the kraal of her seducer and cultivated his crops, but he avers that no further cohabitation took place owing to the magistrate's warning. During this period several head of cattle were paid by him to the girl's father on account of *lobolo*.

Finally the girl took ill and returned to her father's kraal and died there whilst being medically treated by him. At this time it is admitted that preparations for the wedding were in progress.

The Native Commissioner held that these facts constituted a valid union and disallowed a claim by appellant for the refund of the *lobolo* and increase.

Held: In reversing the judgment of the Native Commissioner, that the relations disclosed did not constitute a marriage either under the 1878 Code (then in force in Zululand) or under Native law as recognised in Zululand.

The main essentials of sec. 2 of that Code in respect of women marrying for the first time, as distinguished from widows and divorced women, were the right to claim *lobolo*, the consent of the woman's father or guardian, and the holding of a marriage feast. These essentials were in accordance with Native law as recognised in Zululand.

Held: That it was not possible for the Natives of that Province to observe the other essentials enumerated in sec. 2, *i.e.*, the presence of an official witness to verify that the consent of the bride had been obtained, owing to such officials not having been appointed by the Government, but it was nevertheless essential for them to observe the other requisites as they were possible of compliance.

Held: That appellant's admission that there had been no further cohabitation subsequent to the payment of *lobolo* owing to the magistrate's warning entitled him to a refund of the cattle paid by him on account of *lobolo*, even assuming that there had been a marriage, as it had not been consummated as contemplated by sec. 16 of the 1878 Code.

Held: That cattle paid on account of *lobolo* are regarded as *sisa* stock, and are recoverable together with their increase. Should, however, the prospective father-in-law alienate any with the permission of the owner, only an equivalent number of such cattle are recoverable but not any of the increase thereof accruing subsequent to alienation.

For Appellant: Mr. *K. L. Macpherson*; for Respondent: Mr. *Darby*.

Lugg, Member of Court: As has been emphasized by counsel on both sides, the issue involved in this case ranks as one of the most important for many years.

Appellant (plaintiff in the court below) sued respondent for eight head of cattle and seven increase alleged to have been paid by him as *lobolo* to respondent on the latter's daughter who was engaged to him but died before marriage.

Respondent denies liability for the return of these cattle on the grounds that a *de facto* marriage existed between his daughter and appellant.

The Native Commissioner, Melmoth, finds that there was such a marriage and has awarded a judgment for respondent (defendant) with costs.

This decision is now brought on appeal on the grounds that there was no marriage because the provisions of the 1878 Code (then applicable to Zululand) were not observed.

This Code has been repealed, *vide* Government Notice No. 296, 1928, of the 21st December, 1928, published under the Native Administration Act, with effect from the 1st January of this year, but the events to which the present matter relates took place between 1920 and 1924.

The point raised is an important one especially in view of the dictum laid down in the case of *Mcunu* v. *Mcunu* (1918, A.D. 323) and it will be necessary to refer in some detail to the application of the 1878 Code to Zululand, more especially in regard to Native marriages contracted in that Province.

This Code was applied to Zululand by Proclamation No. 2, 1887, and although subsequently replaced by the Code of 1891 in so far as Natal proper was concerned, it still remained in force in that Province until finally repealed at the beginning of this year. The circumstances under which it so remained in force are fully set out in the case of *Ugijima* v. *Mapumana* (1911, N.H.C. 3) and there is no need to recapitulate them here except to add that this decision was affirmed by the Appellate Division in *Mcunu* v. *Mcunu*, *supra*.

In that particular case Innes, C.J., in referring to the 1878 Code, stated at page 328 that: "The provisions of the Code are not all definite and peremptory; they sometimes relate to customs which, though generally were not invariably observed. But where

they embody rules of law in distinct terms, then those rules must be operative in all cases not expressly or impliedly excluded."

Sec. 2 of this Code lays down what were considered to be the essentials of a Native marriage, and one of these was the "wedding feast," but this requisite only applied to the unmarried woman, widows and divorced women being expressly excluded.

Whilst the Code of 1891 has been strictly enforced in Natal, it is a well recognised fact that the provisions of the 1878 Code in relation to Native marriages have never been brought into operation in Zululand. Amongst its requirements was the appointment of official witnesses and the registration of all marriages, but no steps were taken by the Zululand administration to enforce them, and the position remained as it was prior to annexation. Marriages continued to be regulated in accordance with unwritten Native law.

It is not possible to say definitely why the provisions of this Code were not enforced. It may have been due to political reasons, but my own view is that the omission arose through a mistaken idea that the Code of 1878 ceased to operate in Zululand when the Code of 1891 came into force in Natal. This finds support in the fact that a circular issued by Sir Marshall Clark in 1894 and dealing with divorces was found in *Ugijima* v. *Mapumana* to be *ultra vires* the provisions of the Code; and it is difficult to believe that such a circular would have ever been issued had it been realised that the old Code was still in force.

That it was in operation does not appear to have been realised until the judgment in *Ugijima* v. *Mapumana* was given in 1911, but even then nothing was done to remedy matters. The position remained unchanged and continued as it is to-day.

But for the peculiar situation thus created some difficulty might have been experienced in meeting the dictum laid down by Innes, C.J., in *Mcunu* v. *Mcunu*, but it is difficult to imagine that any Court would hold that because of the absence of certain formalities prescribed by the 1878 Code all unions contracted in Zululand were illegal.

As the 1878 Code was never enforced in relation to Native marriages we are thrown back on purely Native law in deciding the issue raised in this case. The Native Commissioner has come to the same conclusion, and it becomes unnecessary therefore to consider the effects of the dictum of Innes, C.J., in *Mcunu* v. *Mcunu*.

There have been numerous decisions in the Native High Court on the question of *de facto* marriages, and the tendency was, for a time to give recognition to such unions. The Native Commissioner has cited the case of Faneyana v. Mbumane (1918, N.H.C. 103), where the circumstances were similar to the present one, and where it was held that the union was a valid marriage, but Jackson, J., dissented from that decision. In the later case of *Mfanombana* v. *Fana* (1922, N.H.C. 26) where all the earlier decisions appear to have been reviewed and the subject somewhat exhaustively dealt with, the Court refused to give recognition to a union where the parties had lived together for fifteen years because the essentials required by sec. 148 of the Natal Code had not been complied with. This decision considerably modified the views expressed in many of the earlier decisions and was in keeping with the dictum laid down in *Mcunu* v. *Mcunu* in the Appellate Court.

In the Transkei it has been repeatedly held that to constitute a valid marriage all that is necessary is for the women to be handed over and the payment of *lobolo*, but there they have no Code and we are here dealing with a different situation altogether.

Ever since the promulgation of the Natal Native marriage regulations in 1869, which were re-enacted in the Codes of 1878 and 1891, the policy has been to tighten up the marriage laws and to put them on a proper footing.

In considering the matter purely from the Native law view the Native Commissioner states that there are many women in Zululand who are legally married although they have never been through a marriage ceremony, and he expresses the fear that if the present union is not so regarded all Native marriages in Zululand must be illegal. I do not share this view because it is necessary to make a clear distinction between unions contracted by widows and divorced women on the one hand and unmarried women on the other.

As far as my knowledge goes it frequently happens that widows and divorced women simply go and live with the man of their choice with little or no ceremony, and in Zululand such unions are legal, but the position is quite different with a girl being married for the first time. True, where she has been seduced she is not accorded a full wedding ceremony as in the case of a virgin, but Native custom provides, even in such cases, for restoration to partial full status by the observation of certain ceremonies, but

whether reinstated or not, and whether a virgin or otherwise, a woman marrying for the first time is always accorded some form of wedding ceremony. The differential treatment accorded in such cases is not merely empty ritual, but is imposed as a social sanction as a check against immorality, and as an inducement for women to remain chaste. The whole purpose of a wedding is to sanctify the union. We should be careful, therefore, to see that such rules of custom are not lightly interferred with.

The necessity for a wedding ceremony finds support in sec. 2 of the 1878 Code. There the essential of a "wedding feast" does not apply to widows and divorced women—they have been expressly excluded—and one cannot help feeling that the framers of that Code were there merely giving expression to Native law on the point. Even if the section cannot be enforced in full it certainly serves as a useful guide in determining the point.

In the present case respondent's daughter attended appellant's school or church and whilst there was seduced and bore a child to him. He is a married man of about fifty years of age and she a girl of seventeen when she was seduced. The seduction took place in 1920. Thereafter she returned to her father but later went back to her lover and lived with him for a time and then, owing to ill health, was taken back to her own home by her father. Here she received medical treatment at his hands and then died. This occurred in 1924. During these happenings appellant admits he was warned by the magistrate that he would be punished if the girl again became pregnant.

After appellant seduced the girl he made payment of *lobola* and damages, but admits that although she lived in his kraal he did not cohabit with her any further.

On these facts the Native Commissioner holds that there was a *de facto* marriage. He has found as a fact that no marriage ceremony was held, but that one was contemplated, but was postponed owing to the absence of his sons in Durban. By the time they returned from Durban with the girl's trousseau she had died.

Obviously the intention was that there should be a marriage, but here we are dealing with a rule of evidence. In the words of Best on *Evidence* (Ninth Ed. p. 305), "the law presumes against vice and immorality, and on this ground presumes only in favour of marriage; so that cohabitation and reputation are held to be presumptive evidence of marriage", but as there was an intention in the present case to hold a marriage ceremony

this rule cannot have any application whatever, and it can only apply to those cases where such a course is justified. Reputation is one of the fundamental principles of the rule, but here the parties were living together whilst preparations were being made for the wedding contrary to the orders of the magistrate. If we are to accept appellant's statement that there was no cohabitation after the birth of the child, then (assuming that the mere payment of *lobolo* and the father's consent constitute a marriage) there was no consummation of the union as laid down by sec. 16 of the old Code and the prospective husband would be entitled to a refund of the *lobolo* advanced by him.

These loosely formed unions should be discouraged. This has been the policy since 1869 in Natal, and there is no reason why the Natives of Zululand should not be required to adhere more strictly to their more ordered customs in matters of this kind.

I feel sure that the marriage of girls in Zululand without the customary wedding feast must be very rare indeed and our ruling should create no hardship whatever.

The Native patriarchal system is regulated by the law of primogeniture, and the kraal family system established under it requires that the status of every married woman should be known and clearly defined; and it is generally at her wedding that her status is fixed. If therefore these marriage customs are relaxed a certain amount of confusion will result.

I am of opinion that there was no marriage.

The important point in the case to the parties is, that if the union is regarded as legal appellant will not be able to recover the *lobolo* he has paid on account, and will remain liable to respondent for the balance. On the other hand, if it is not a legal union he will be entitled to the refund of a certain number. We are not, however, in a position at this stage to say what number is recoverable because we have no definite pronouncement on the point by the Native Commissioner. Having held that there was a marriage it was not necessay for him to decide the point.

A point has been made of the fact that appellant allowed respondent to dispose of three of the *lobolo* after the girl's death, but whether this was done with his acquiescence or not, cannot affect the legal position as we find it.

Cattle tendered on account of *lobolo* are treated as *Sisa* cattle. Should the parties not marry they are recoverable together with their increase, but should any of their number be paid to third

parties with the permission of the owner, their equivalent in number or value only is recoverable and not any increase thereof.

The appeal is sustained and the judgment of the Native Commissioner is set aside with costs.

STUBBS, P.: The legal position has been lengthily reviewed in the historical dissertation of my brother LUGG and he comes to the conclusion because of the absence of the formalities prescribed by the provisions of the Code of 1878 which in Zululand was operative until its repeal by Act 38 of 1927, we are thrown back upon Native law as if the provisions (*supra*) governing the formalities of marriage did not exist. It is clear from the reasoning of both the Native Commissioner and my brother LUGG that the section of the Code dealing with the essentials of marriage has never been observed in Zululand and no definite reason can be found therefor, so that for a period of more than half a century the provisions of this section have been ignored and the latter, in agreement with the former, states we are in the circumstances thrown back upon what the essentials of a Native union are at Native Common law as if the provisions of the Code were non-existent.

The Native Commissioner in his judgment observes that if it is decided that the alleged union in question is not a legal union, "all other unions in Zululand are illegal for the same reason and the whole Native population is illegitimate." My brother LUGG on the other hand discounts this view because it is necessary to make a clear distinction between unions contracted by widows and divorced women on the one hand and unmarried women on the other. But even so, we are still faced with the situation of the unmarried women who possibly in their thousands have contracted unions without regard to the essentials of marriage as laid down in the Code or as recognised in Native Common law. I do not know if it has ever been claimed for the Code that it is a complete and exhaustive statement of Native law but I presume the framers essayed in Clause 2 to express the essentials as derived from sources of Native law.

To hold that unions by word of mouth or unions contracted in the absence of recognised forms either by the Code of Zululand or in Native law merely by the girl covertly leaving her home and going to live with her lover and/or the passing of *lobolo* are legal unions would be to create a state of affairs that

cannot be contemplated with equanimity. Yet in effect that is precisely what we are asked to say in this case. There are, too, the implications of an analogous situation brought about by the modern habit, largely the outcome of contact with Europeans and the influences abroad in industrial centres, of loose relationships that spring up and subsist between men and women in those centres producing an outlook wholly different from that of fifty years ago, which all goes to show the tendency of modern times to look with complacency upon the steady whittling away of orthodox forms which made the institution in the eyes of the grey-beards who cradled them into being something more than a mere convenience to be lightly set aside at the whim and caprice of a couple desirous of living together in illicit intercourse, and these tendencies we should resolutely combat by upholding in our decisions so far as is consistent with natural justice and public policy, the cardinal principles which underlie and govern the institution. Jackson, J. in a judgment in *Fancyana* v. *Mbumane* (N.H.C., 1918), subsequently reversed on appeal to the full bench of the Native High Court, which, in many aspects, is exactly similar to this case, held similar views. He said, *inter alia*: "There are certain ceremonies which are observed, and always have been observed in the case of an ordinary marriage of a girl. There is the gathering and a feast, generally an animal is slaughtered, and there is the consent of the father. None of these were observed here. I think to uphold the judgment of the magistrate in this case would be to create a very undesirable and dangerous precedent, which would tend to throw open the door for mixed relationships without any form of marriage. Any girl who likes to go away and stay at her lover's kraal could be said to be married to him. It is surely opposed to public morality to encourage any such view. If there is nothing definite to denote a marriage, the results, I think, would be extremely unfortunate. The Native Code which applies to Zululand of course gives certain essentials which are entirely opposed to the view the magistrate has taken but the special regulations have never been enforced, and it is a little difficult, therefore to apply strictly all the clauses that refer to marriage."

In spirit the remarks of Mr. Justice Leslie in *Mjanombana* v. *Fana* (N.H.C. 1922) coincide.

While I fully realise with the Native Commissioner to hold in the present case that the union is not a valid one might be

to throw the whole machine out of gear with resultant repercussions the ill-effects of which might be incalculable, I confess to an impotence to find a way out without doing violence on the one hand to those essentials of clause 2 of the Code capable of practical and practicable application as was clearly comprehended by the decision in *Ntuli* v. *Ntuli* (1921, A.D. 276), which held that it has been generally accepted that the Native Code of 1878 which admittedly became law in Zululand by Proclamation 2 of 1887 has continued to be in force there up to 1921, and, on the other, without entirely eschewing the sanctions of Native customary law, and to give effect to one or other, as we are bound to do, we must consider the facts in the light of that decision and decide whether there has been such a compliance with essentials as would substantially satisfy the legalities. Expressed otherwise: Where there is identity or similarity of essentials in the Code and Native law, we must examine the facts in the light of both and say whether in this case there has been such a compliance as would make the union a valid one. For this purpose we must decide whether in the first place there was a valid customary union. If the answer be in the affirmative the appellant must fail. If it be in the negative he must succeed.

The Native Commissioner in the court below has held there was a *de facto* marriage. He has said in his reasons for judgment he has come to this conclusion because all the circumstances constituted a legal marriage according to Zulu unwritten law, the only law hitherto recognised or practised in Zululand and he relies on the case *Faneyana* v. *Mbumane* (*supra*) in support of his judgment.

The facts are, in 1920 the girl Mamazi, the daughter of respondent, visited the home of the appellant ostensibly for the purpose of receiving religious instruction. Respondent is a preacher in the Dutch Reformed Church. He claims to be a Christian. His age is fifty years. He is a married man or lives with a woman with whom he contracted a customary union. Mamazi was a young girl of seventeen years of age. During her attendance at appellant's church she was seduced by him, became pregnant and bore a child now in the care of respondent. Appellant was called upon to make compensation for the seduction and did so. She returned to her father's kraal but shortly afterwards returned to appellant. Respondent appears to have complained to the magistrate about their conduct, and she was ordered to return to him

but did not do so and remained with appellant for a period of about eight months during which he paid to respondent eight head of cattle as *lobolo* for her. Appellant has stated, and is uncontradicted, that she was accommodated during the eight months stay in a separate hut and they did not cohabit. It was at this juncture that appellant on four different occasions importuned respondent to allow him to marry Mamazi and met with the answer that he (respondent) had not the money required for the marriage. Eventually respondent said the brothers of Mamazi in Durban would bring her trousseau on their return from work at Durban. Mamazi became ill and with the concurrence of appellant she returned to her father for medical treatment. She was medically treated at her father's expense. She died as the result of this illness before a marriage ceremony had taken place. The sons eventually returned from Durban bringing with them the trousseau which they sought to deliver to appellant but he refused to take delivery as there had been no marriage. Later (the year before last, appellant says) respondent called upon appellant to pay the balance of *lobolo* and met with the answer that as there had been no marriage respondent was not entitled to make the demand. On the contrary, if there were any liability it lay upon respondent to make refund of the *lobolo* of eight head of cattle and increase. The latter claim was resisted on the ground that the parties had lived together as man and wife.

There are somewhat significant features in this case as indicating the state of mind and intention of the parties: The child begotten of the illicit intercourse remained with respondent. Mamazi was with appellant when she fell ill. She went back to respondent's kraal at the instance of appellant to undergo medical treatment. She remained with respondent two months and was succoured and medically treated at his expense until her death. If, as is contended, the relation of appellant and Mamazi was that of man and wife properly the child should have been in their charge and the obligation of tending her in her illness and the payment for her medical treatment rested not with respondent but with appellant. A still more sigificant feature is that after the seduction and the birth of the child when Mamazi returned to stay—a period of eight months—with appellant, she occupied a separate hut and there was no cohabitation. Surely if this has any meaning at all, it is that no conjugal relationship subsisted? It could not be because of the cleansing period which in most tribes is as a rule

not longer than two years, as Mamazi gave birth to the child three years before her return to appellant. It may be that the explanation is that appellant feared the legal consequences of an adulterous relationship because of the magistrate's warning that he would be charged criminally if she again became pregnant, but why the fear and why the warning if as is contended for respondent, they were *de facto* man and wife?

The ground of appeal is:—

(*a*) The judgment is against the law in that the essentials for a Native marriage as laid down by the Code of 1878 were not complied with.

(*b*) The Native Commissioner was therefore wrong in finding that the union between plaintiff and the girl Mamazi constituted a marriage.

(*c*) The plaintiff is therefore entitled to a refund of *lobolo* paid.

In the present case there was no marriage feast: nor was there a ceremony at an early part of which clause 2 of the Code makes it essential that the official witness do make public inquiry from the intended wife whether it is of her own free will she is about to be married. The Native Commissioner in his reasons for judgment emphasises that this essential has never been implemented by the appointment in Zululand of official witnesses and in the absence of that machinery it has not been possible in Zululand to comply with this essential. It would appear then the practice in Zululand has been to continue to celebrate customary unions in terms of Zulu custom and according to their recognised forms as if the provisions of clause 2 of the Code were non-existent.

In the absence of evidence of the precise nature of the essentials to a valid customary union among the Zulu in Zululand, I hazard the opinion that they do not fundamentally differ from those of other recognised tribal entities and may be stated to be: (i) the consent of the parent or guardian of the woman, (ii) *lobolo* or *bogadi*; modern times have produced certain modifications of the primitive marriage by the addition of the consent of the girl and the husband. And no doubt the associated practices to which my brother LUGG has alluded in his remarks, and which are not inconsistent with those prescribed in the Code, must be added so far as concerns Zululand.

It is contended (i) there was implied consent in that the girl went to live with appellant who thereafter paid *lobolo* to respondent and appellant is now estopped from denying there was con-

sent, and (ii), there was compliance. It is however assumed from the fact that respondent demanded a further three head of cattle the *lobolo* was not paid in full. This in itself is not important. Would it not be placing too great a strain on these actions and their legal consequences to hold that that is the right construction to place upon them? Can they be held to mean that the essentials in Native law have been complied with? I think to hold that view the logical outcome would be not only to neutralise the attempts hitherto made to give effect to the legal forms of a customary union but to violate the sanctions of Native customary law.

We must next examine the facts in terms of clause 2 of the Code of 1878 and ascertain whether the alleged union satisfied the essentials as there laid down. The answer may be thus briefly summarised:—

(i) There was no marriage feast nor was there a ceremony at an early part of which public inquiry by an official witness was made from the intended wife whether it was of her own free will she was about to be married.

(ii) There was a payment of *lobolo*.

(iii) There was not a technical handing over of the intended wife.

As stated, official witnesses have never been appointed in Zululand. It has been argued that the feast is not an essential. It is definitely evidence that a marriage ceremony has taken place. Thus in regard to the feast at any rate, (i) has not been complied with. As regards (ii), it is clear that the intention of the parties was that there should be a marriage ceremony. What form that ceremony should take is not disclosed, but in the circumstances of the parties it would not be unreasonable to assume that it was to be in accordance with accepted forms.

Chadwick, J., has said in the *Faneyana-Mbumane* case that it is an almost universal rule that the marriage ceremony is dispensed with where there has been prior seduction. My brother Lugg on this point states that the woman is always accorded some form of wedding ceremony. Even if this were not so and the view of Chadwick, J., were accepted as the correct one there seems no reason why that rule might not be varied by agreement of those directly concerned as has been the case here.

There was consensus and the parties were *ad idem* that a marriage ceremony should take place. The condition was never fulfilled owing to the death of Mamazi before the trousseau arrived. It

has been urged in argument that the passing of *lobolo* impliedly waived the condition but this view cannot be sustained because the condition was made after the payment and delivery of *lobolo*. The inference to be drawn from the conduct of respondent in accepting, in the circumstances, part payment of *lobolo* is not that it implied consent but was a consent conditioned and contingent on the fulfilment of a marriage ceremony and if there was no fulfilment, it follows there was no consent. Even the modern legal maxim that where two persons have lived together as man and wife the union is presumed to be a legal one cannot apply here because there was not a living together in the sense of conjugal relationship.

Shorn then of all but one of the essential requisites of the Code and Native customary law, we are narrowed down to the essential condition—essential in the sense that without fulfilment there was no consent—the failure to comply with which leads me without hesitation to come to the conclusion that, whether we apply the test of clause 2 of the Code or Native common law, there was no valid union.

The intended marriage having failed without blame in the appellant to be in fact celebrated, in terms of clause 16 of the Code of 1878 he (no question of prescription arising) is entitled to the recovery of the cattle given for the marriage or their value.

The judgment of this Court is therefore that set out by the learned member Lugg with the addition that the appellant may revive his claim and proceed with the proof and final determination thereof, the evidence already taken to form part of the record, to be supplemented with such additional evidence as either party may desire to call.

Ahrens, Member of Court: It is not necessary for me to traverse the same ground as that covered by the learned President and my brother Lugg, who have dealt with all points most exhaustively and extensively. I will confine myself to but a few remarks.

Respondent unfortunately insisted on some kind of wedding ceremony before handing over his daughter to the appellant. He thereby introduced a qualification to his consent. He admits that the appellant came to him on four distinct occasions and asked him to give him his daughter in marriage, but this request was refused for reasons stated. But for this refusal there seems no doubt that the parties to the Union would have come together

and this dispute would not have arisen, or if there had then been a dispute it would have assumed a different form.

Appellant, strangely enough, and, no doubt, for the purpose of strengthening his case suggests that a ceremony was necessary when he says: "Even at Christian marriages there is a ceremony and an official witness." I cannot persuade myself to believe him when he states that he never cohabited with the girl although she came to live at his kraal. What did she go to his kraal for but to live with him as man and wife. He took good care that she should not become pregnant in view of the magistrate's warning to the effect that should she again become pregnant, he would be criminally prosecuted. She occupied a "separate room" as appellant himself puts it, presumably a room under the same roof of a so-called "kolwa" house. Be this as it may, this point does not appear to me to affect the case one way or the other.

In my own district, viz., Nqutu, which is situate in Zululand, official witnesses were appointed years ago but it appears they never functioned as contemplated by the Code. The only registration effected by them was in the nature of a report of an intended marriage at the office of the magistrate, now Native Commissioner, which was noted in a record kept for such purpose. Many of these intended unions, as will be readily understood, were never consummated. Until quite recently official witnesses never officiated at weddings.

I agree with the Native Commissioner that there are many women in Zululand who have not gone through a marriage ceremony. They simply went to a man, lived with him as his wife, *lobolo* was paid for them and everyone considered them as married.

The *lobolo* usually consisted of from two or three to six or seven head of cattle and in many instances some of these cattle were returned to the husband by the wife's father.

To hold that in this case there is no valid union will mean that a great number of unions in Zululand will be devoid of legal sanction and a considerable number of children will thereby be declared illegitimate.

Whilst thus admitting that the decision arrived at by the learned President and my brother Lugg creates a state of affairs throughout the Province of Zululand which requires to be remedied, I feel, nevertheless, though reluctantly, compelled to concur in their decision as the essentials constituting a valid union as laid down either by Native law or the Code of 1878 are absent in this case.

As has already been pointed out in *Mcunu* v. *Mcunu* and *Ntuli* v. *Ntuli*, it is necessary that the provisions of the Code, where the language is definite, must be observed, where this is practicable.

In so concurring, and whilst sensible of the resultant effects of this decision, we are bound to give effect to the legal position as we find it, but as an administrator in Zululand of several years standing I feel it incumbent upon me to say that the unfortunate state of affairs thus created calls for immediate remedy by the Legislature.

DICK KUZWAYO v. MPEHLELA NGCOBO.

1929. *December* 18. Before Stubbs, President, Lugg and Ahrens, Members of the Court.

Gambling and loan transactions.—Sections 2 of Act 41 of 1908 (N.), application of.—Weight of evidence.

Facts: An appeal from the decision of the Native Commissioner at Durban. Where the claim was for £3, money lent and advanced by respondent to appellant and where the issue revolved round the question of an alleged loan on the one hand and an alleged gambling transaction on the other, and where the grounds of appeal were that the judgment was against the weight of evidence and the transaction was bad in law, in that appellant endeavoured to recover money lost by gambling.

Held: That as the transaction was not a gambling debt but a gratuitous loan, made on the instant to accommodate a friend, and does not fall within the meaning of sec. 2 of Act 41 of 1908, the appeal must be dismissed with costs.

Cases referred to: *Alfred Mtembu* v. *Phillip Mtembu* (N.H.C. 1915, 129).

For Appellant: Mr. *Forbes*; for Respondent: Mr. *Macpherson*.

Stubbs, P.: The claim is for £3 money lent and advanced by respondent to appellant. Respondent at the hearing in the court below was represented by Mr. Attorney *Macpherson*, appellant conducted his own defence. The plea was one of denial.

The issue revolves round the question of an alleged loan on the one hand, and an alleged gambling transaction on the other.

The grounds of appeal are:—

(*a*) That the judgment was against the weight of evidence.

(*b*) That the transaction was a gambling one and not good in law.

The parties are supported each by one witness.

The Native Commissioner believed the evidence of the respondent and his witness as against the evidence of appellant and his witness, which on the question of the transaction having been one of gambling he rejected.

It is for this Court to say whether on the facts the Court of first instance was right in coming to this decision. The respondent gives the date on and circumstances in which the loan of £3 was made in February of this year in the presence of Charlie Ndimande at his employer's premises. Charlie Ndimande substantially corroborates this evidence.

Appellant states that it was the first month after Christmas he went to respondent's house where people were playing cards for money. He took a hand in the game and he says: "Plaintiff won all the money from all the people who were playing that night. He won from me £2. After I lost £2 I went to my room and got £6. With the £6 I won £15 from the others including plaintiff. At another date plaintiff won £3 from me. Of the £15 I won, £6 had belonged to plaintiff. As plaintiff had won back £3 I decided to leave and the £3 the plaintiff claims is the balance he had lost to me."

His witness Tipson Ngcobo states: "The plaintiff lost to defendant later in the evening. I did not hear the parties talking about £6 or £3 that night. Of the £15 that was won I lost about 6s. Plaintiff lost all that he had previously won. Stakes from 5s. up to 10s. were played for."

It is significant that this witness who after having, as he says, lost 6s. "sat and looked on at the play" has not a word of corroboration to offer about plaintiff having won back £3 from appellant. Is the incident of appellant's having won £15 separate and distinct from the one of £3 won back by respondent which appellant describes as having taken place "at another date"? Because if so, quite obviously his witness Tipson could not have been present on that date for he testifies to a different set of facts involving the winning by appellant of £15.

The Native Commissioner in his reasons for judgment has said the defendant's witness, other than corroborating the gambling

incident, has no direct bearing on the matter in dispute. By this he means: beyond giving his version of the alleged gambling incident he has tendered no direct evidence to show that the loan was never made and in this I agree with him.

It has been contended by Mr. *Forbes* that if it is held by the Court that the transaction was not of the nature of a gambling one and is one of loan pure and simple, then the provisions of sec. 2 of Act 41 of 1908 must apply and respondent cannot succeed. This has not been made a ground of appeal but I am, however, unable to agree with his view. The loan was a gratuitous one made on the instant to accommodate a friend both being Natives living under Native law—and cannot be held to fall within the meaning of sec. 2 of Act 41 of 1908. The decision in *Alfred Mtembu* v. *Phillip Mtembu* (N.H.C. 1915, 129) supports this view. The probabilities in the circumstances are in favour of the truth of respondent's version and I think the Native Commissioner rightly accepted it in preference to the story told by appellant. The appeal is therefore dismissed with costs.

Members of the Court, concurred.

MFUNENI KUZWAYO v. MGWAQO MTEMBU.

1929. *December* 19. Before Stubbs, President, Lugg and Ahrens, Members of the Court.

Appeals from Chiefs' Courts.—Jurisdiction of Native Commissioners.—Section 12 (3) *and* (4) *of Act* 38, 1927, *and Government Notice No.* 2255, *December*, 1928, *rules* 5-8.—*Non-timeousness in the noting of an appeal from the Court of a Native chief to that of a Native Commissioner.—Competence of Native Appeal Court to take cognizance* suo motu *of defect of non-timeousness.*

Facts: An appeal from the Native Commissioner's Court, Mapumulo. Contrary to Rule 5 of Government Notice No. 2255 of December, 1928, prescribing a period of 14 days within which to note an appeal from a chief's court to the court of Native Commissioner, summons disclosed that a period of 47 days, includ-

ing Sundays, elapsed before appeal was noted. The Native Commissioner entered judgment without taking judicial cognizance of the defect of non-timeousness. An appeal was noted against the judgment. The question arose whether the Appeal Court was called upon to take judicial cognizance of the period of non-timeousness in the noting of an appeal from the Court of a Native chief to that of a Native Commissioner and whether the proceedings in the court below were by this defect vitiated and became void *ab origine* or whether it was competent for this Court to hear the case on its merits?

Held: Ahrens (Member), *dissentiente*. That the proviso to sec. 12 (3) of Act 38, 1927, was not founded on considerations of public policy and must therefore be regarded as merely directory and not imperative. Consequently the regulations framed to give effect to this section can only be directory.

Held further: That Rule 5 of the Regulations giving effect to sec. 12 (3) of Act 38, 1927, being directory the Native Appeal Court could not *suo motu* take the point that because the appeal to the Native Commissioner appeared to be out of time therefore the judgment of the Native Commissioner was a nullity and could not be dealt with on appeal at all.

Held, further: That sub-sec. 4 of sec. 12 of Act 38, 1927, read with Rules 5 and 8 empowers a Native Commissioner to determine the appeal as if it were a case of first instance. So that in effect such case became one of first instance from the Court of the Native Commissioner to the Appeal Court. The Native Appeal Court could therefore hear such appeal on the merits.

Cases referred to: *Scholtz* v. *Mostert* (1926, C.P.D. 406); *Sim* v. *Cape Dairy* (1923, T.P.D. 340).

For Appellant: Mr. *D. G. Shepstone*; for Respondent: (In default).

Stubbs, P.: From the outset, I feel that it is both desirable and appropriate that this Court should take the preliminary point of non-timeousness in the noting of the appeal in this case from the judgment of the Native chief to the Court of Native Commissioner, and Mr. *Shepstone* for the appellant, respondent not being represented by counsel, is asked to argue it and I am indebted to him for the lucid manner in which he has done so.

It is clear on the face of the summons that the judgment of

the Chief Maqilimana Ntuli was pronounced on the 9th of May, 1929, and that the date of summons is the 25th of June. It is not indicated either in the summons or on the record whether appeal from the judgment of the Native chief was noted within the prescribed period of fourteen days as provided by Rule 5 of Government Notice No. 2255 of December, 1928. We are left to infer that the date on which the appeal was noted is that appearing on the summons, namely, the 25th of June in which case an actual period of 47 days including Sundays elapsed before appeal was noted. The question then arises whether in view of the fact that so many other cases coming before this Court at this session suffer the same defect, this Court of its own motion is called upon to take judicial cognisance of the period of non-timeousness in the noting of an appeal from the Court of a Native chief to that of a Native Commissioner, and to hold that because of such defect the proceedings in the lower court are so vitiated that they are void *ab origine* and must therefore either be set aside or referred back to the Native Commissioner for him to set them aside? The answer must, I think, be in the negative.

Sec. 12 (3) of Act 38 of 1927 provides: "Any party dissatisfied with the judgment of a Native chief or headman may, in the manner and within the period prescribed by regulation, notify such chief or headman (or his representative) of his intention to appeal to the Native Commissioner, and thereupon such judgment shall be suspended until the decision is given on such appeal: Provided that such appeal is prosecuted within the period prescribed by regulation." Sub-sec. 4, read with Rules 5 to 8, empowers a Native Commissioner to determine the appeal as if it were a case of first instance in such Court, so that in effect it becomes a case of first instance brought to this Court in appeal from that of the Native Commissioner.

While it is vested with appellate powers in matters appealed to it from a Native chief's court it resolves itself into one of first instance if in the same matters appeal is brought from it to this Court and it becomes highly debatable whether we are competent to take cognizance *suo motu* of the defect now under notice.

If a party to a dispute fails to note his appeal within the time prescribed by regulation, namely 14 days, the question of whether the Native Commissioner has jurisdiction to hear an appeal as such must depend upon whether sec. 12 (3) of Act 38 of 1927 is imperative or directory? If it is merely directory, the regulation framed

to give effect to it can only be directory, and a failure to comply with the regulation will involve nullification of the proceedings. The tendency of any Court will be to strain the provisions of sec. 12 (3) so as to interpret them as being merely directory, as otherwise inconvenience and injustice will result.

If it can be said that the proviso to sec. 12 (3) is founded on considerations of public policy, then it must be regarded as imperative and not capable of being waived by the respondent to an appeal to a Native Commissioner. If, however, the limitation in point of time to the right of appeal is not a matter of public policy but a provision in the interests of a successful party, then it is capable of being waived, and the Native Commissioner would be entitled to exercise appellate jurisdiction in the absence of objection by the respondent. I think it can hardly be said to be a matter of public policy that a right of appeal should be extinguished in every case where there is failure to give notice of intention to appeal within 14 days. This would necessarily give rise to grave injustice in certain cases, a fact that is recognised by the practically universal way in which Courts are given a discretion to extend periods for noting and prosecuting appeals by the rules that govern them. The omission of such provision in the rules relating to the Native Commissioner's Courts does not, I think, alter the character of sec. 12 (3) but merely indicates an incredible mistake on the part of the framers of the rules, whose intention does not affect the intention of the Legislature.

If this view is correct the Native Appeal Court cannot of its own motion take the point that because the appeal to the Native Commissioner appears from the papers to have been noted out of time, therefore the judgment of the Commissioner was a nullity and cannot be dealt with on appeal at all, or must simply be disregarded, leaving the judgment of the Native chief intact; for this would necessarily be the result of taking and giving effect to such a point, unless the Commissioner's judgment is to be effective as an arbitration award, as in *Scholtz* v. *Mostert* (1926, C.P.D. 406).

This Court must assume that the directory provision in sec. 12 (3) has been waived. The argument that there cannot be a waiver without knowledge may arise but it is not competent to assume absence of knowledge and it would not be competent for this Court of its own motion to call evidence on the point. This is only competent for the parties themselves to raise. Further, it seems it

can properly only be an issue before the Native Commissioner himself in proceedings to have the judgment set aside as being void *ab initio*, if raised before him after judgment. On the general considerations governing the problem the following extracts from *Maxwell* are relevant: "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidatory consequences in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience; but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice . . . . . without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature.

A strong argument in favour of the view that sec. 12 (3) read with the regulation as to the time limit of 14 days ,is imperative, occurs in *Maxwell*, where it is said that: "Where a statute confers a right, privilege or immunity, the regulations which it prescribes for its acquisition are imperative, in the sense that non-observance of them is fatal," but the reply to this seems to be that the paramount consideration in interpretation is one of endeavouring to give an enactment a meaning that will not give rise to inconvenience and injustice: the proviso to sec. 12 (3) is capable of meaning: "The respondent to an appeal shall be entitled to object if the appeal is not prosecuted within the prescribed period." This interpretation is supported by the consideration that it is not a matter of public policy that the right of appeal shall be prescribed within a certain limited period. The right of appeal is not one that is opposed to the maxim interest *rei publicas ut finis sit litium*, which only has reference to multiplicity of original suits arising out of the same matter, or to appeals on interlocutory matters. The case of *Sim* v. *Cape Dairy* (1923, T.P.D. 340) is in point where the Court laid down that a judicial officer should of his own motion take a point invalidating a transaction if it involved an illegality or a question of public policy, otherwise not.

If it is said that a party cannot by waiver or consent give the Court a jurisdiction it would otherwise not have, the reply seems to be that the Native Commissioner is definitely given an appellate

jurisdiction in the matter under consideration and the directory enactment regarding the noting of appeal does not affect the jurisdiction itself, but the manner or conditions under which it can be exercised. The result is that if the point of non-timeousness is taken before the Commissioner (or perhaps later before the Court of Appeal) by the party (respondent), the Court, in the absence of a bar of granting an extension, must uphold it, but cannot take it and should not take it *suo motu* unless in its opinion sec. 12 (3) is imperative: *a fortiori*, the Court of Appeal cannot take the point *suo motu*. If there is power of granting an extension of time then the effect of this would be to empower the Court to grant such extension in spite of objection by the respondent; the absence of such a power does not necessarily mean that this Court should *suo motu* take the point of non-timeousness, because absence of objection does not have the effect of conferring a jurisdiction which the Court would not otherwise be entitled to exercise.

It is therefore my opinion that it is competent for this Court to hear the appeal in this case on the merits.

LUGG, Member of Court, delivered a concurring judgment.

AHRENS, Member of Court: I do not share the views of the learned President and my brother LUGG as I consider the provisions of sec. 12 (3) of Act 38, 1927 to be peremptory and not merely directory. This being so, we as an Appeal Court, are entitled of our own motion by virtue of the powers conferred on us by sec. 15 of Act 38, 1927, to take cognizance of the defect of non-timeousness in the noting of the appeal from the Chief's Court to that of the Native Commissioner.

It is clear on the face of the record that a period of 47 days elapsed between the date of trial before the chief and the noting of appeal to the Court of Native Commissioner. Thus the time limit of 14 days laid down by Rule 5 of the rules of the Chief's Civil Courts, framed under the provisions of sec. 12 (3) has been exceeded and it was not competent for the Court of the Native Commissioner to entertain the appeal.

Sec. 71 of Act 49 of 1898 (N), which empowered the Native High Court to frame rules in regard to procedure in magistrates' courts in Native cases and in the courts of native chiefs, has been repealed by Act 38 of 1927. The rules framed under the above section provided for discretionary powers in regard to extension of the time limited for noting appeals against the chiefs' judgments on

good grounds being shown to the magistrate. Rule 5 of the present rules of native chiefs' courts, for some reason or other, falls short of this discretionary power. It is hoped that this glaring omission with its curtailment of rights hitherto enjoyed by native litigants in all other tribunals will be immediately rectified. I have no doubt that it is looked upon by all the natives concerned as a grievance, and rightly so.

The judgment of the Native Commissioner, in this case, is, in my opinion, void *ab origine*, because it was not competent for him to have heard the appeal, as the judgment of the chief had become final by reason of the fact that the time within which to appeal had expired.

The clerk of the court was wrong in the first instance in noting or accepting the appeal from the chief contrary to the provisions of the rules.

Stubbs, P. delivered the judgment of the Court: The plaintiff in this matter claimed from the defendant before the Native Commissioner, one grey she-goat kid, but lost the case. He appealed to the Native Commissioner, Mapumulo who allowed the appeal with costs.

The defendant now appeals against the decision of the Native Commissioner on several grounds, as fully set out in his notice of appeal.

It is quite clear from the evidence that Rules 7 and 8 of the rules for chiefs' civil courts have not been complied with and the chief or his accredited representative has not been afforded an opportunity for stating his reasons for his finding.

The appeal is therefore sustained with costs and the case is sent back to the Native Commissioner for compliance with the rules and for re-trial, costs in that court to be costs in the cause.

1929. *December* 29. 1930. *January* 7. Completed before Stubbs, President, Martin and Ahrens, Members of the Court.

General heirship.—Affiliated houses. Lobolo *claim for first born daughter to affiliated house.—Marriage registers.—Sections* 162 *and* 160 *of the Code.—Costs.*

Facts: An appeal from the Native Commissioner's Court, Ndwedwe. Facts appear from the judgment.

For Appellant: Mr. *Forbes*; for Respondent: Mr. *McSwaine*.

Stubbs, P., delivered the judgment of the Court: This case originated in the Court of the Native Chief Mandhlakayise wherein the respondent sued the appellant for 12 head of cattle, and obtained a judgment as prayed. This decision was taken in appeal to the Native Commissioner at Ndwedwe who upheld the chief's judgment, and dismissed the appeal with costs.

At the outset we must say that we have had extreme difficulty in arriving at the facts of this case owing to the very unsatisfactory manner in which those facts have been presented. The evidence of the parties, particularly that of the respondent, is most meagre and uninstructive and it is a pity that more care was not taken to make the position clearer. For purposes of elucidating the genealogy of the family involved in this issue reference should be had to the tree attached hereto which is based on the evidence recorded.

The position seems to us to be as follows: The parties are descendants of one Bhongo who had five wives (there is a disagreement in regard to the order in which these women were taken, but this is not material to the issue) namely:—

(1) Mayekwana.

The mother of Mvuso (the father of the respondent), three other males and two females, Gigi and Nomkondo. This woman was Bhongo's chief wife and Mvuso was his general heir. Respondent succeeded to his father's position on his death.

(2) Nonkwence.

The mother of Njube (the heir to her house) two other males and three females including Nomazawuzele and Nonzondo.

(3) Nokahambeni.

Who bore four children.

(4) Masoko alias Nomakulu.

The mother of appellant (defendant), two other males, and a female, and

(5) Makoti.

The respondent's father Mvuso was the general heir of Bhongo and on his (Mvuso's) death the general heirship passed to the respondent.

The respondent alleges that during Bhongo's lifetime he (Bhongo) used certain cattle belonging to one or more of his senior houses for purposes of marrying Masoko alias Nomakulu, the mother of the appellant, and it is these cattle which he now claims back from the appellant. He states the number as 12. It is difficult if not impossible to ascertain from the evidence of the respondent as recorded, the source from where these cattle came. Firstly, he says that his father (presumably he means his grandfather) took eight head from the house of Njube, i.e., the son of Nonkwence. There is nothing to show why these cattle were taken from that house. In the next breath he says that the cattle of his own sister Gigi were used to establish Masoko's house (no number is stated) together with three head of the cattle of Nonzondo (*i.e.*, the daughter of Nonkwence of another house). He alleges that his father (again it is presumed he means his grandfather) arranged that these cattle were to be replaced by cattle to be received as *lobolo* for the girl first born to the house of Masoko, who proved to be Mqiki, the sister of the appellant. This girl in course of time became engaged to one Mantinti and has borne two children to him though no marriage has yet taken place. Respondent says that his father received £18 from the prospective husband, presumably as *lobolo*, and it is difficult to understand why he has not given any credit for this amount which is equivalent to four head of cattle. Possibly he is somewhat confused as to what this £18 represented. His witness Njube (the son of Nonkwence and the uncle of the respondent) says that the money was paid to Mvuso as *lobolo* for his sister Giki and not for Mqiki and this may be the explanation. Counsel for respondent has, however, elucidated this point by explaining that the £18 was received on account of *lobolo* of Mqiki from a former suitor who was rejected in favour of the man with whom we are now told she has since contracted a customary union.

There appears to have been no public declaration made at the time of Masoko's marriage of the establishment of any debt upon her house, nor is there any evidence of any declaration concerning

the source from which her *lobolo* came. In fact in her marriage certificate it is distinctly recorded that no debt rested upon her house. Respondent's witnesses, Njube (his uncle) and Gigi (his aunt) testify, however, that Bhongo arranged that the cattle used to establish Masoko's house must be returned to the "Indhlunkulu," but here again there is a discrepancy inasmuch as Njube says that all 12 cattle were to be paid to Mavuso in the first instance of which he must retain nine head and hand the balance of three head to Njube to replace the cattle of the latter's sister Nonzondo, whereas Giki says that Bhongo's instructions were that the three head were to be handed to Njube direct.

The appellant on the other hand denies any liability to the respondent. He contends that it was the *lobolo* cattle of Nomazawuzele, the daughter of Bhongo's second house of which Njube is the heir which were used to *lobolo* his mother, together with three head received on the marriage of Nomazawuzele's younger sister Nonzondo. He does not specifically deny that a debt was thus created but claims that his mother's marriage certificate proves that there was no such debt. He says further that in any case such debt would be due to Njube and not to the respondent.

He denies further that his sister Mqiki was apportioned to respondent, but in this respect he is not supported by his own witness Nsungulo who states definitely that such an arrangement was made. This witness supports the appellant, however, in his contention that it was Nomazawuzele's cattle that were used to establish appellant's house. He does not explain why, however, if such were the case, the cattle should be refunded to the respondent.

As stated it is clear that at the time Bhongo married the appellant's mother no public declaration was made that a debt on her house was created in favour of the Indhlunkulu. In fact it is definitely shown in the certificate of registration of marriage that no such debt was created. Possibly some such arrangement was subsequently made by Bhongo but there is entire lack of unbiased evidence to support this. The presumption, therefore, must be that no debt was created and that the appellant is entitled to succeed to the property of his house.

Sec. 160 of the Code reads as follows: "The accuracy of any entry in the marriage registers, relating to obligations upon houses created by or at their establishment by marriage may be impeached by any person having a direct interest in such entry, at any time within six months from the date of making such entry, but not

afterwards, except in cases of proved falsity in connection therewith, and all such complaints shall be enquired into and determined by the Administrator of Native Law." There was no falsity suggested in this case. There has been no impeachment. This goes to show that at the outset there was no debt on the newly-established house. If a subsequent disposition by the kraal head in favour of his senior house had been made within six months it lay upon the kraal head Bhongo to cause the necessary action to be taken to have the entry in the marriage register amended accordingly. Bhongo, as the guardian of the interests of his several houses and having been a party to the registration of the marriage and the facts being peculiarly within his knowledge, was the proper person to have effected any amendment of the entry. Having failed to do so within the period prescribed by the section referred to, impeachment is now barred and the certificate in terms of sec. 162 of the Code must be accepted as conclusive evidence that no debt rested on that house.

The respondent would not be entitled to a refund of the three head of cattle of Nonzondo that were used to establish Masoko's house. If they are due to anyone they would be due to Njube of the second house.

In any event the action appears to us to have been premature in as much as the girl Mqiki, at the time this issue was decided, was not yet married and no claim would be competent until such event happened.

The appeal must therefore succeed with costs in this Court, and the judgment of the Native Commissioner is altered to one sustaining the appeal with costs.

BHONGO			DHLADHLA		
	Mayekwana	Nonkwence	Nokahambeni	Masoko (Nomakula)	Makoti
	Mvuso (*M*)	*Mjube* (*M*)	Pani	*Mgingqa* (*M*) (Appellant)	
	Giki (*F*)	*Nomazawuzele* (*F*)	Vumbe	Ndoda	
Mqati (Respondent Plaintiff).	Mnyayiza (M)	Nsingwana (M)	Napugu	Hlambisayo	
	Maqamba (M)	Muntunjani (M)	Basongali	*Mqiki* (*F*)	
	Mgidi (M)	*Nonzondo* (*F*)			
	Nomkondo(F)	Nosentela (F)			

1929. *December*; 1930. *January* 6 completed. Before STUBBS, President, LUGG and AHRENS, Members of Court.

Native customary unions.—Validity of union.—Question of domicile and lex loci.—*Guardianship.—Property rights in children.* —Lobolo *claims.*

FACTS: An appeal from the Native Commissioner's Court, Bulwer. Plaintiff's domicile is in East Griqualand. He married a girl who was on a visit from Bulwer to the kraal of his father. *Lobolo* was paid for her. Two children were born of this union. The woman got ill and returned to her kraal where she died. Defendant, the brother of deceased, refused to return the children on the ground that there was no valid marriage and that he was entitled to their custody and to receive their *lobolo.*

On a claim of plaintiff to be proclaimed the lawful father and guardian of these children or alternatively, the return of the *lobolo* paid for their mother, the Native Commissioner gave judgment for plaintiff with costs. An appeal was brought against this decision and the basic question of the validity of the union was argued.

HELD: That the essentials of a customary union are governed by the *lex loci* and that these essentials were present, namely: (*a*) The consent of the guardian; (*b*) the payment of *lobolo*; and (*c*) the handing over of the girl; and that as in East Griqualand the registration of native marriages or customary unions does not obtain, the marriage was a valid one.

The appeal was dismissed with costs.

For Appellant: Mr. *D'Alton*; for Respondent: Mr. *Bulcock.*

AHRENS, Member of Court, delivered the judgment of the Court: In the Court of the Native Commissioner for the district of Bulwer the plaintiff claimed:—

(*a*) An order that he is the lawful father and guardian of two girls Kolwase and Mbhoni and as such to receive their *lobolo* and custody.

(*b*) Alternatively the return of 18 head of cattle paid for the woman Zendile; and

(*c*) Costs of suit.

The Native Commissioner declared plaintiff to be entitled to the *lobolo* cattle paid for the girl Kolwase and to the custody of

Mbhoni, with costs. The defendant now appeals against the finding of the Native Commissioner on the grounds that same is "against the weight of evidence and the law amongst other grounds to be filed.' No other grounds having been filed and counsel for appellant having in his argument narrowed the issue to one of the validity or non-validity of the union of Maciti (plaintiff) and Zendile, the Court is called upon to consider and decide that issue.

Zendile the daughter of the late Chief Bhidhla, grandfather of defendant, became engaged to plaintiff when accompanying her half sister Mbhungeane on a betrothal visit to the kraal of the late Chief Zimema, plaintiff's father, in the Umzimkulu district, East Griqualand.

The consent of her brother and guardian (Dhlangaua) does not appear to have been obtained at the time of the engagement, but after messengers had been sent to him with an offer of 11 head as the first instalment of *lobolo*, the consent was given.

Zendile lived with the plaintiff for a number of years, and bore children to him, two daughters, Kolwase and Mbhoni. She eventually became ill and desired a change of surroundings. She decided to return to her people. About three months later she died at the kraal of defendant's brother Sihlangu. Kolwase and Mbhoni had accompanied their mother on her visit to her people and after her death plaintiff wished to take them home but Sihlangu apparently decided to hold them as security for the balance of *lobolo*.

Sihlangu died and plaintiff approached defendant requesting him to allow the two girls to come home with him. He then paid defendant 20 sheep, the equivalent of another 5 head of cattle.

Defendant admits having received 14 head or their equivalent. Plaintiff claims to have paid 18 head altogether but this dispute does not affect the merits of the case.

As stated, the point to be decided is whether there was a marriage or customary union between plaintiff and Zendile. From the evidence adduced there seems to be no provision in East Griqualand for the registration of native marriages or customary union. The validity or otherwise of a marriage depends on or is governed by the *lex loci*. It has been laid down in the Transkei Courts that the essentials of a Native customary union or marriage is the handing over of the girl and the payment of *lobolo—Jiba*

Rabayi v. *Vangidzi* (Prentice Hall, 31 January, 1925). Plaintiff's domicile is in East Griqualand and there the alleged union was contracted and then they lived together as man and wife for a considerable number of years. There was issue of this union, viz., two daughters Kolwase and Mbhoni, and this issue now forms the subject matter of this case.

It is significant that Zendile's hut was registered for tax purposes at the kraal of Zimema situated in East Griqualand of which kraal plaintiff was an inmate and therefore it was common knowledge that Zendile was regarded as plaintiff's wife, with whom he lived.

Defendant frankly admits that he is speaking from hearsay. He confesses to having received 14 head of cattle in respect of Zendile's *lobolo*, which cattle were paid by plaintiff. He does not deny that Dhlangu gave his consent to the marriage. Nor does he deny that Zendile lived with plaintiff as man and wife for many years.

He claims 15 head for Kolwase and yet at the same time he regards her as an illegitimate child in which case he would be entitled to 10 head only.

He seems to have resorted to the alleged ill-treatment of Zendile by plaintiff as his last card to play.

The Native Commissioner has held that the circumstances are all in favour of plaintiff's contention that he was validly married to Zendile and in view of what has been said there appears to be no reason to disagree with him.

This being so plaintiff is entitled to the property rights in Kolwase and Mbhoni the issue of this union. The Native Commissioner gave judgment declaring plaintiff to be entitled to the *lobolo* cattle paid for the girl Kolwase and to the custody of Mbhoni with costs.

All the Native Commissioner was called upon to decide was whether or not there was a valid union.

We have on the facts laid before us come to the conclusion that he rightly decided there was a valid union and all that is necessary for us to do is to sustain his judgment in that regard.

The appeal is therefore dismissed with costs.

1929. *December*; 1930. *January* 7 completed; before STUBBS, President, MARTIN and AHRENS, Members of the Court.

Native law and custom.—Chief's power to inflict punishment.—Contempt of court.—Maximum penalty.—Section 51, *Natal Native Code.—Sections* 12 *and* 20 *of Act* 38, 1927.—*Government Notices Nos.* 2255 *and* 2256, *December,* 1928.—*Wrong forum.—Costs.*

FACTS: An appeal from the decision of the Native Commissioner at Helpmekaar. Where the Native Commissioner, in the matter of an appeal from a chief's decision imposing a fine of £3 on appellant for contempt of court, dealt with the action as a civil one, and where from the Record it was not clear whether the Chief or the Native Commissioner purported to deal with the offender under sec. 51 of the Natal Native Code or under sec. 20 of Act 38, 1927.

HELD: That the judicial authority of a Native chief to deal with civil disputes among his own people and the Court to which the appeal shall lie is derived from sec. 12 and authority to deal with offences and the Court of Appeal is governed by sec. 20 of Act 38 of 1927. A chief's power to punish for contempt of his court is derived from sec. 51 of the Natal Native Code. In the former instance appeal lies to the Native Commissioner, in the latter, to the magistrate, *qua* magistrate and that as sec. 20 creates no offence but confers power to try offences which are punishable under Native law and custom, the appellant has come to the wrong forum and the appeal must be ordered to be struck from the roll.

HELD, further: That the appellant should not be mulcted in the costs as it was open to respondent to have objected in the court below to the matter being treated as a purely civil appeal and also in respect of the action in the Appeal Court. The Court made no order as to costs.

For Appellant: Mr. *Shepstone*; for Respondent: Mr. *McSwaine*.

STUBBS, P.: This is an appeal from the finding of the Native Commissioner of Helpmekaar in which he dismissed the appeal brought by Ngqozomela Madonsela against the judgment of the Chief Bande wherein he was fined £3 for contempt of court. Briefly the facts are: That the appellant is a member of the Chief

Bandi's tribe. He was warned on a number of occasions to appear with his witnesses before the chief in a civil action between one Mpinda Nkabinde and himself, but failed to do so, excusing himself, when called upon for an explanation, on the ground that " he could not get away from his master's work." When eventually he did put in an appearance the chief tried and convicted him for contempt of court and fined him £3. Against this judgment he appealed to the Native Commissioner who dealt with the matter as a civil one in his capacity as Native Commissioner.

The appeal is brought against the whole judgment. The reason for the appeal, the appellant states, is that his master would not let him leave his work and for that reason he was unable to attend the chief's court.

It is necessary to decide from the outset whether the proceedings before the chief and the subsequent appeal were of a civil or criminal nature.

It has been held in the Transvaal that a chief has inherent power to inflict punishment by fine or imprisonment for contempt of his court—*Makapan* v. *Khope* (A.D. 1923). In Natal the chief's power in this respect is governed by sec. 51 of the Code of Native Law which reads: " In adjudicating upon any matter, or in performing any judicial act, chiefs are entitled to claim and exercise the privileges appertaining to courts of law, in respect of disobedience of their orders, or contempt of their persons or Courts, and may for such offences impose a fine not exceeding £2."

The judicial authority of a Native chief to deal with civil disputes among his own people and the Court to which appeal shall lie is derived from sec. 12, and authority to deal with offences and the Court of Appeal, is governed by sec. 20 of Act 38 of 1927 implemented by Government Notices Nos. 2256 and 2255, respectively, dated the 21st of December, 1928. In the former instance appeals lie to the Native Commissioner. In the latter, to the magistrate, *qua* magistrate.

In the case before us, it is not shown on the Record whether the chief or the Native Commissioner purported to deal with the offender (appellant) under sec. 51 of the Code or whether they purported to deal with him under the general powers conferred by sec. 20 of Act 38 of 1927. I hardly think that it could be under the latter as this section creates no offence but confers power to try offences which are punishable under Native law and custom. There is nothing in the provisions of the latter ousting sec. 51 of

the Code or the chief's power thereunder. They merely prescribe the jurisdiction of a Native chief over members of his tribe . . . . in offences punishable under Native law and custom; the limit of the fine; the procedure at the trial of an offence under the section, the manner of execution of any penalty imposed in respect of such offence and the appropriation of fines . . . to be in accordance with Native law and custom: and that appeals from any conviction under the section shall lie to the magistrate.

It is not for this Court to decide upon the merits of the finding of the chief or the magistrate—*en passant*, if the appellant was dealt with under sec. 51 of the Code (*supra*), the maximum penalty has been exceeded, and the period within which appeal shall be noted has lapsed—but merely to determine whether the appeal rightly lies to this Court. I think I have said sufficient to show that the answer must be in the negative.

The appellant has come to the wrong forum for his remedy and in doing so he has brought the respondent here. In ordering the appeal to be struck from the roll the question arises whether he should be mulcted in the costs. I do not think so, because it was open to respondent to object in the court below to the matter being treated as a purely civil appeal, and it was open to him to adopt the same attitude in respect of the appeal in this Court, but as he has neglected to do so, it seems to me the more equitable course would be to make no order as to costs. It is ordered accordingly.

Martin and Ahrens, Members of Court: We concur.

NODWENGU CILIZA v. GENA KANYILE.

1929. *December*. 1930. *January* 9. completed. Before Stubbs, President, Martin and Ahrens, Members of the Court.

Rule 19, *Government Notice No.* 2254.—*Wasted costs.—Pending case.—Sub-section* 5, *sections* 17 *of Act* 38 *of* 1927.

Facts: An appeal from the decision of the Native Commissioner at Ixopo. Where the record disclosed that summons was issued on the 6th day of November, 1928, and the hearing was fixed for the 11th day of December, 1928, and postponed till the 18th of

March, 1929, on which date evidence was taken; and where the respondent timeously made application in accordance with Rule 19 of the Appeal Court for the case to be struck off the roll in terms of sec. 17 (5) of Act 38 of 1927.

HELD: That the case is a pending one in terms of sec. 17 (5) of Act 38 of 1927, and that the Court had no jurisdiction to hear the appeal.

HELD, further: That as the respondent had timeously notified the Court that he would make an application to have the case struck from the roll in view of the fact that it was a pending case in terms of the Act, and that as the appellant had not given notice of withdrawal, the respondent should have wasted costs.

Cases referred to: *Nsolo Mbata* v. *Msayise Ngobese* (N.A.C. decision, April, 1929).

For Appellant: In Default; for Respondent: Mr. *Macpherson*.

STUBBS, P.: Appellant in this case has made no attempt to enter appearance nor has he filed an application withdrawing the appeal. Mr. *Macpherson* is here to-day for respondent and he asks that as the matter before us falls under the category of a pending case in terms of the decision of this Court in the matter of *Nsolo Mbata* v. *Msayise Ngobese*, decided by this Court on the 23rd April, 1929, the appeal be struck from the roll with costs in favour of respondent.

The application for costs in this matter is differentiated from the application for costs in the matter of *Mconde Mnyandu* v. *Kana Mnyandu*, dealt with to-day, in that in the former both parties were represented and no application by respondent was timeously made for the application to be struck from the roll for want of jurisdiction, whereas in the latter Mr. *Macpherson* has timeously notified the Court of his intention to make such application in terms of Rule 19.

The respondent has been brought here by the appellant and he is, in the circumstances stated, entitled to an order for costs.

MARTIN, Member of Court: I concur.

AHRENS, Member of Court: I concur.

1929. *December*; 1930. *January* 9, completed. Before STUBBS, President, MARTIN and AHRENS, Members of the Court.

Application to reopen case.—Pending case, sub-section 5 of section 17 of Act 38, 1927.—Leave to continue an appeal from Chief's Court to Court of Native Commissioner.

FACTS: In the area of jurisdiction of the Native Commissioner, Pinetown, applicant applied for leave to continue an appeal from the chief's decision to the Native Commissioner.

The case was originally set down for the 13th March, 1918, but owing to the respondent being continually in default the summons was dismissed by the magistrate on the 2nd March, 1920.

HELD: That the application was brought to the wrong forum, in terms of sec. 17 (5) of Act 38 of 1927.

The application was ordered to be struck off the roll.

Cases referred to: *Nsolo Mbata* v. *Msayise Ngobese* (N.A.C. decision, April, 1929).

For Appellant: Mr. *Samuelson*; for Respondent: Mr. *Mitchel*.

STUBBS, P.: This is an application by Mr. *Samuelson* on behalf of Mconde Mnyandu for leave to continue his appeal from the Chief Ndunge to the Native Commissioner, Pinetown, which originally was set down in that Court for the 13th May, 1918, and owing to the respondent having continually made default the case was adjourned from time to time and finally on the 2nd March, 1920, the magistrate dismissed the summons because of the default of the applicant, appellant in the magistrate's court.

In view of the decision in the case of *Nsolo Mbata* v. *Msayisi Ngobese* decided in this Court on the 23rd April, 1929, this is not the forum to which this application should be made; the application is struck from the roll.

MARTIN, Member of Court: I concur.

AHRENS, Member of Court: I concur.

1929. *December.* 1930. *January* 9, completed. Before E. T. Stubbs, President, B. W. Martin and F. W. Ahrens, Members of the Court.

Native law and practice.—Claims arising out of seduction. Ngqutu *beast.—Civil action by female, sections* 226 *and* 208 *of Code.—Rule* 26 (*c*) *of Courts of Native Commissioners.*

Facts: An appeal from the decision of the Native Commissioner at Estcourt.

In the court below plaintiff claimed £12 or three head of cattle, being the *ngqutu* beast, the penalty beast, *ihlawulo* and extra beast. Plaintiff's ward who is a minor was seduced by the minor son of defendant. Application was made by defendant for the dismissal of the summons on the grounds that appellant was absent, that the claim should have been against the seducer and not against the seducer's father and that it should have been instituted by the seduced girl's mother as she was the only person competent to claim the *ngqutu* beast. The Native Commissioner dismissed the summons with costs and stated that the order was made in accordance with Rule 26 (*c*) of the Rules of Courts of Native Commissioners.

Held: That from secs. 208 and 68 of the Code of 1891 it was clear that women were excluded from taking action in claims arising out of the seduction of their daughters. These claims including the *ngqutu* beast are instituted by the kraal head and when recovered are accounted for to the women's house by virtue of sec. 68 of the Code. The girl's mother could not have figured in this action.

Held, further: That in the absence of plaintiff the Native Commissioner should have granted an adjournment and awarded wasted costs against the defaulting party seeing that Rule 26 (*c*) is fairly wide in its application.

The appeal was therefore upheld with costs and the case remitted for trial, appellant to have the right to amend his summons if such is desired.

For Appellant: Mr. *van Aardt*; for Respondent: Mr. *Shepstone* (instructed by Mr. Chadwick).

STUBBS, P.: Appellant alleged that his ward had been seduced by respondent's minor son, and claimed £12 damages. This amount was regarded as being equivalent to three head of cattle.

The exact relationship of plaintiff to his ward is not given.

Appellant was unable to attend the trial but requested his cousin Mbodhlana to appear for the seduced girl's mother and to assist her in the action.

Application was made for the dismissal of the summons on the grounds that (*a*) appellant was absent; (*b*) that the claim should have been against the seducer and not against the seducer's father; and (*c*) that it should have been instituted by the seduced girl's mother as she was the only person competent to claim the *ngqutu* beast.

The Native Commissioner has not stated specifically on what grounds he dismissed the summons, but states that his order was made in accordance with Rule 26 (*c*) of his Court in Native civil cases. He also remarks that the case was set down for hearing on the 30th September; that appellant's attorneys were advised by the clerk of the court on the 16th of that month, and that they should have had ample time to advise their client of the date of hearing. It is, however, on record that they wrote to the clerk of the court on the 20th September advising him that they were unable to get into touch with their client as he was in Zululand.

We are now asked to say whether the Commissioner was correct in dismissing the summons.

Appellant's representative, Mbodhlana, made a statement, which is recorded, to the effect that the three cattle claimed comprised the *ngqutu*, the penalty beast or *ihlawulo*, and a beast as damages. He admitted that the girl did not become pregnant as the result of the seduction.

Sec. 226 of the Code lays down that no civil action may be brought in any court of law by or against any female unless she is assisted by her guardian or unless she is a recognised kraal head.

This clearly infers that notwithstanding the inferior position conferred upon females by Chapter VIII of the Code, they nevertheless enjoy the right to institute civil actions in courts of law provided that they are duly assisted or are kraal heads.

As far as the present record stands appellant was cited as the plaintiff.

Sec. 208 of the Code provides that "the seduction of a girl gives to her kraal head or guardian a civil claim in damages against

the kraal head of the seducer irrespective of any criminal liability of the seducer." In view of the special provision of this section it will be necessary to consider whether in claims arising out of seduction it is permissible for a woman to sue for her *ngqutu* beast. Such a beast is inseparable from such a claim.

In the case of *Nomcibi* v. *Vayivayi* (1921, N.H.C. 1) it was held that she had the right, but it is not clear from the ruling whether it was to apply specifically to seduction cases or whether it was merely an expression of opinion in general terms. Undoubtedly a woman can sue in other cases, but in view of sec. 208 and the wide powers conferred on kraal heads by sec. 68 it appears clear that the intention was to exclude women from taking action in claims arising out of the seduction of their daughters. It is certainly undesirable that they should. In common practice these claims are instituted by the kraal head, and when recovered the damages (including the *ngqutu*) are accounted for to the woman's house. There is a duty imposed on the kraal head to do this under sec. 68, and he is under an obligation to account for all house property to the several houses to which it belongs. If the woman were allowed to intervene in such cases it would lead to the unnecessary splitting up of the action, and sec. 208 seems to have been introduced to prevent this. I am therefore of opinion that the girl's mother could not have figured in the present action as plaintiff.

There are, of course, cases where she could, e.g., where all the *lobolo* except the *ngqutu* had been paid. It seems to be the custom in some areas to pay this before the *lobolo* proper.

One of the exceptions taken to the summons is that the claim was made against the kraal head of the seducer instead of the seducer himself. As already stated, I am unable to say whether the Native Commissioner accepted this as one of his reasons for dismissing the summons or not, but if he did, then I think he was somewhat premature.

It was laid down in *Sisimana* v. *Simaki* (XVIII N.L.R. 56) that a kraal head could not be held liable for the delicts of an inmate of his kraal except on grounds recognised under Roman-Dutch law, but in the present case the merits were not gone into and we are not in a position to say whether the facts justified the kraal head of the seducer being liable or not. Conceivably such cases can arise, and in this case we have it on record that appellant originally intended to sue the seducer but was advised by his attorneys to proceed against his kraal head. There may have

been special reasons for this! and if it was one of the grounds for dismissing the summons then I think the lower court again acted prematurely.

On the other hand we have it on record that appellant wrote to his mother asking her to institute the action duly assisted by her cousin Mbodhlana. The Native Commissioner assumes from this that by doing this appellant had no intention of appearing, but the mother consulted an attorney and on his advice the action was instituted in its present form. It would appear therefore that it was the intention for appellant to figure as the plaintiff, and I find myself in disagreement with the Native Commissioner on this point also.

Rule 26 is fairly wide in its application, but it is usual to grant an adjournment and to award wasted costs against the defaulting party, and I think this course should have been followed here.

The appeal is upheld with costs and the case remitted for trial, appellant to have the right to amend his summons if such is desired.

MARTIN, Member of Court: I concur.

AHRENS, Member of Court: In concurring with the judgment of the learned President I think it necessary to add that the question arises whether the Native Commissioner was justified in dealing with the merits of the case without taking some evidence. Mbhodhlana's statement which was made without admonishment, is of no assistance whatsoever, and of no value either one way or the other. The Native Commissioner therefore was wrong in deciding on the merits of the case without having some evidence before him.

In view of the letter from Messrs. Findlay, van Aardt and Haviland under date the 20th September, 1929, which forms part of the record and where the clerk of the court was advised of the fact that the notice of the hearing was rather short as the plaintiff's whereabouts were unknown, the case should have been postponed.

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